

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
AT CHARLESTON

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THE CITY OF HUNTINGTON,	:	Civil Action
	:	
Plaintiff,	:	No. 3:17-cv-01362
	:	
v.	:	
	:	
AMERISOURCEBERGEN DRUG	:	
CORPORATION, et al.,	:	
	:	
Defendants.	:	

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	:	
CABELL COUNTY COMMISSION,	:	Civil Action
	:	
Plaintiff,	:	No. 3:17-cv-01665
	:	
v.	:	
	:	
AMERISOURCEBERGEN DRUG	:	
CORPORATION, et al.,	:	
	:	
Defendants.	:	

BENCH TRIAL - VOLUME 11
BEFORE THE HONORABLE DAVID A. FABER, SENIOR STATUS JUDGE
UNITED STATES DISTRICT COURT
IN CHARLESTON, WEST VIRGINIA

MAY 17, 2021

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Proceedings recorded by mechanical stenography;
transcript produced by computer.

1 PROCEEDINGS had before The Honorable David A. Faber,
2 Senior Status Judge, United States District Court, Southern
3 District of West Virginia, in Charleston, West Virginia, on
4 May 17, 2021, at 9:00 a.m., as follows:

5 THE COURT: Mr. Nicholas, you have something you
6 want to bring up with the Court and I understand this -- we
7 have nobody in the courtroom but people who are associated
8 with the case and we're not streaming it into the overflow
9 room for this presentation by you, right?

10 MR. NICHOLAS: Thank you, Your Honor, and I'll
11 make one more request on that issue and that is I would ask
12 that this very short portion of our discussion, that this
13 portion of the transcript be sealed.

14 THE COURT: All right. It will be sealed.

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10 (Recess taken)

11 THE COURT: Well, we're back on the record
12 unsealed.

13 Mr. May, are you in the courtroom?

14 THE WITNESS: Yes, sir.

15 THE COURT: Will you come forward and take the
16 witness stand? And you're still under oath, sir.

17 THE COURT: All right. Ms. McClure?

18 MS. MCCLURE: Thank you, Your Honor.

19 **CONTINUED CROSS EXAMINATION**

20 **BY MS. MCCLURE:**

21 **Q.** Good morning, Mr. May.

22 **A.** Good morning.

23 **Q.** So, we covered a good bit of your background on your
24 direct on Friday. I'd like to circle back and ask you a few
25 questions about your prior experience at the DEA.

1 So, after a 30-year career in DEA, is it fair to say
2 that you understand at a high level the organizational
3 structure of the DEA?

4 **A.** I think that's fair.

5 **Q.** Okay. Could you just briefly describe at a very high
6 level the organizational structure?

7 **A.** So, DEA is a law enforcement agency that also has a
8 regulatory responsibility, so I think it's kind of unique.
9 The DEA has a headquarters, a central authority, which is in
10 Arlington, Virginia, and that is where the leadership of the
11 agency works.

12 It also has field divisions throughout the United
13 States and, at each field division, there is a special agent
14 in charge who is responsible for that area of
15 responsibility. And so -- and within each field division,
16 we have agents, Task Force officers, diversion investigators
17 and, depending upon the location of the field division, the
18 numbers of personnel at each field division would differ.

19 Underneath the special agent in charge, you have
20 assistant special agents in charge. And then, below them,
21 you have group supervisors and then special agent and
22 diversion investigator workforce.

23 **Q.** So, given that description, is it fair to say that
24 there are two sides of the DEA?

25 **A.** I think that's fair to say in terms of Diversion

1 Control and in the enforcement side of the agency.

2 **Q.** So, enforcement side and Diversion Control?

3 **A.** Correct.

4 **Q.** And are those two sides funded differently?

5 **A.** Yes, they are. The Diversion Control part of the
6 agency is what we call fee funded. So, it's all about the
7 registrants that pay for their registration. That's what
8 goes to fund the Diversion Control efforts of DEA.

9 **Q.** And how about the other side, the enforcement side?

10 **A.** That's congressionally. Like every budget and every
11 federal agency, it's a congressionally authorized budget.

12 **Q.** And in your career did you work on both sides?

13 **A.** I worked almost my entire career on the enforcement
14 side of the agency in -- actually, I would say my whole
15 career, although my last several months, while in the
16 Atlanta Field Division, I had oversight responsibility for a
17 Tactical Diversion Squad.

18 **Q.** And, Mr. May, in a few sentences could you describe the
19 various placements in your enforcement career?

20 **A.** Sure. I started my career in Boston and was first
21 transferred to New York City. I spent five years in New
22 York City where I worked as a special agent.

23 Following that time, I transferred overseas for my
24 first overseas assignment. I worked in Marcet, France for
25 two years, followed by Paris, France.

1 I was then promoted back to DEA headquarters. I did a
2 stint on DEA Headquarters and then was asked to lead a new
3 program at DEA called the Regional Enforcement Team. It was
4 a separate funded program. And I did that for three years.
5 I got the program up and running.

6 I later supervised the Drug Task Force in the City of
7 Charlotte, North Carolina for about five years. That was
8 followed by another foreign assignment where I was posted in
9 Rome, Italy, but I had oversight responsibility for all of
10 the DEA Offices in Africa and some in Europe.

11 **Q.** During your time at DEA, did you ever work on cases or
12 -- involving the diversion of prescription opioids?

13 **A.** I had a couple of occasions to just support Diversion
14 Control in terms of their investigations. I specifically
15 remember two instances supporting them. They don't have
16 arrest powers so, if they're going to want somebody
17 arrested, they ask for assistance from the Special Agent
18 Workforce.

19 **Q.** Did any of your time at DEA involve a Tactical
20 Diversion Squad?

21 **A.** Yes, the last -- the last about ten months of my career
22 in Atlanta.

23 **Q.** Can you tell the Court what a Tactical Diversion Squad
24 is?

25 **A.** A Tactical Diversion Squad is a group that's made up of

1 special agents, diversion investigators, state and local
2 investigators, and Intelligence Analysts. And it's a
3 relatively new concept which put together this hybrid group
4 to address the opioid investigations and controlled
5 substance investigations.

6 **Q.** Was that the last role you had with DEA before you
7 retired?

8 **A.** It was.

9 **Q.** Okay. Switching gears out of your background and now
10 into the Diversion Control Program today at
11 AmerisourceBergen. So, for the benefit of the Court, we're
12 going to start by describing the modern program; and then,
13 we will go back in time and talk about their various
14 sections and how they developed over time.

15 So, talking about the Diversion Control Program as it
16 is enforced today, could you generally describe the
17 components of that program?

18 **A.** Sure. I'm going to go back to our bucket language from
19 last week and essentially having four buckets. When first
20 on-boarding a customer, we have a new customer due diligence
21 component where we collect certain information from the
22 customer and then we take that information and a member of
23 the team will review the information, verify certain
24 information, relying upon public data sources and could be,
25 as I mentioned on Friday, you know, looking at the

1 backgrounds of both pharmacists and physicians and verifying
2 any adverse actions in looking at such things as the
3 quantities of particular controlled substances the customer
4 intends to order. So, that -- that is what I refer to as
5 essentially bucket number one.

6 MS. MCCLURE: And, Richie, could we put up on the
7 screen the demonstrative of this, the first bucket?

8 BY MS. MCCLURE:

9 Q. Okay, and the second?

10 A. So, if you look at the life of a customer, the second
11 logical step would be the Order Monitoring Program. And,
12 you know, in terms of that new customer review, we may or
13 may not authorize that customer to purchase controlled
14 substances. Assuming that we didn't have any risks that we
15 could not mitigate, we would authorize that customer to
16 purchase controlled substances and listed chemicals.

17 And then, each and every order by that customer would
18 then be subject to our Order Monitoring Program where --
19 which is, as I explained on Friday, the program that
20 AmerisourceBergen has had in place to identify and report
21 suspicious orders.

22 Q. And the third?

23 A. The third would be, again, back to due diligence. It's
24 this notion of ongoing due diligence. So, when we on-board
25 a customer, our efforts don't end at that time. And so, as

1 I mentioned, we will continue to monitor each and every
2 order of controlled substances and listed chemicals by that
3 customer and we'll also have these analytics that we've
4 developed where we look at the customer more wholistically
5 and we refer to them as "dashboards" so that, you know, not
6 only are we looking at individual orders that come to our
7 attention, but we're also looking at the purchasing over
8 time of all products, controls and non-controls, by that
9 customer.

10 On occasion, when we're engaged in this process, if we
11 see potential red flags we could engage with a customer and
12 that engagement could be as simple as sending the customer
13 an e-mail inquiring about a specific order or it could be
14 arranging a site visit to the customer with the help of our
15 outside contractor, the Pharma Compliance Group, in order to
16 mitigate those red flags.

17 **Q.** And the fourth?

18 **A.** The fourth would be policies and procedures and I would
19 lump in there, as well, some training.

20 **Q.** Which is on this slide as the fifth.

21 **A.** I'm sorry. I can't see the slides.

22 **Q.** That's okay.

23 MS. MCCLURE: Richie, could you put up the fifth?

24 THE COURT: It's on your monitor there, sir.

25 THE WITNESS: Thank you, sir. Thank you.

1 Training. I'm sorry. Thank you.

2 So, talk about policies and procedures first. Again,
3 we -- we've always had policies and procedures associated
4 with the program starting in around 2014, when we were
5 contemplating changes to the program. What we found was,
6 you know, the policies and procedures we had in place didn't
7 match with those changes.

8 And so, as we began to make changes in the program
9 between 2014 and 2016, we realized that, hey, we have to
10 start again with our policies and procedures. So, we
11 published a new set of policies and procedures specifically
12 for the Diversion Control Program in 2017 and really, I
13 would -- you know, that's the foundation of the program so
14 that we have a bases for everything that we do.

15 **Q.** And the fifth?

16 **A.** The fifth would be training. And we have different
17 types of training that we carry out at AmerisourceBergen.
18 We train our customers to some extent. We train our
19 internal groups, whether it's the groups at the distribution
20 centers, or even our own team members when they're
21 on-boarded.

22 We train our sales staff. And I think I mentioned we
23 developed an electronic training program for them. It would
24 have been around late 2016 to replace some of the training
25 that had occurred previously using power points and things

1 such as that.

2 **Q.** And, Mr. May, have these been -- in your assessment
3 having joined the company in 2014 and still there today,
4 have these five buckets been the main part of
5 AmerisourceBergen's Diversion Control Program since you
6 started with the company in 2014?

7 **A.** Yes.

8 **Q.** And when you joined the company, in looking back, I
9 believe you testified on Friday that you looked back. Is it
10 your understanding that these components have been -- were
11 indeed part the Diversion Control Program many years before
12 you joined the company?

13 MR. FARRELL: Objection, Your Honor.

14 THE COURT: What's the basis?

15 MR. FARRELL: Foundation. He arrived with the
16 company in 2014.

17 MS. MCCLURE: Your Honor, Mr. May testified as to
18 his prior --

19 THE COURT: Well, if you would, lay a foundation
20 for it. Go ahead.

21 MS. MCCLURE: Okay.

22 BY MS. MCCLURE:

23 **Q.** Mr. May, when you joined the company, did you -- I
24 believe you testified on Friday you looked at what was
25 currently in place at the time; is that correct?

1 **A.** Yes, I did. I had conversations with other members of
2 CSRA who I identified to understand what the program was. I
3 reviewed documentation around the program. I reviewed
4 existing policies and procedures around the program.

5 **Q.** So --

6 THE COURT: Overruled. I'll let him answer.

7 BY MS. MCCLURE:

8 **Q.** Mr. May, has this been your understanding of the
9 program for many years before you joined at least from 2007
10 forward based on that review that you've talked about?

11 **A.** Yes. So, all of the buckets that you see here, they
12 had, as well, when I joined the company.

13 **Q.** And is this program a national program or is it
14 regional in any way?

15 **A.** This is a national program.

16 **Q.** Briefly, with new customer due diligence, you've
17 described a lot of the checks that you've already done. Are
18 licensed checks done for DEA and the corresponding state
19 agency, whatever that may be called in that state, for every
20 new customer when they're joined?

21 MR. PIFKO: Objection, Your Honor. Just objection
22 to the extent this is cumulative on what was discussed on
23 Friday and repetitive of testimony that we already have.

24 MS. MCCLURE: Your Honor, we're going to cover two
25 points with new customer due diligence and then move on.

1 THE COURT: Overruled. Go ahead.

2 THE WITNESS: I'm sorry. Can you repeat the
3 question?

4 BY MS. MCCLURE:

5 Q. Are license checks done at the beginning of every
6 initiation of a new customer with DEA and whatever the
7 corresponding -- corresponding state agency would be?

8 A. Yes. We do license checks and we would make a copy of
9 those license checks and include those in the due diligence
10 file and it would be the DEA registration. You know, a
11 pharmacy license by the State. And some states also require
12 a controlled substance license, which is separate, but all
13 of those checks would be performed.

14 Q. Okay. Moving on to the Order Monitoring Program, I
15 believe you've testified that that is a process where
16 there's a computer flag and then a human review. Do I have
17 that correct?

18 A. That is correct. I'm not sure I completely described
19 the process on Friday, but it is a two-step process and it
20 has been a two-step process going back at least until 2007
21 and essentially what happens with the program is that when a
22 customer places the order, the order is then instantly
23 reviewed electronically.

24 And if certain -- in the former program, if a threshold
25 was surpassed, then that order would be automatically held,

1 could not be picked, packed or shipped until it was then
2 reviewed to determine whether the order is suspicious.

3 Going back into 2014-2015 when we enhanced our program,
4 it's the -- in terms of the mechanism and how the program
5 works, it's the same notion that an order is held based upon
6 parameters being exceeded. When that order is held, it
7 cannot be picked, packed and shipped. It's then reviewed by
8 a member of the Diversion Control Team, who decides whether
9 the order is, in fact, suspicious.

10 **Q.** Based on your review of the program when you joined and
11 your knowledge of it through to today, has that two-step
12 process been the case from 2007 to the present?

13 **A.** It has.

14 **Q.** Just to be clear, Mr. May, when AmerisourceBergen
15 receives an order from a pharmacy or any customer, does that
16 order include prescription-level information?

17 **A.** Orders do not include prescription-level information.

18 **Q.** So, how -- can you explain how an order -- what an
19 order is that we receive from the pharmacy customer or the
20 hospital customer?

21 **A.** So, we define an order as a unique drug family. We
22 have identified in our program about 70 drug families. So,
23 it would be a -- a unique drug family. The order is placed
24 on -- at one time, at the same time. So, it would be a
25 particular date and time for a certain quantity of that

1 controlled substance family. That would define an order.

2 So, for example, if I may, it would be a customer who
3 places an order and ordered oxycodone. He could have
4 ordered several different NDC's or different types of
5 oxycodone products, but they would all be considered one
6 family, and the total quantity on that particular time would
7 represent the order.

8 **Q.** Mr. May, do orders come in to AmerisourceBergen for
9 non-opioid products every day?

10 **A.** Yes.

11 **Q.** Have you hear heard the phrase "just in time delivery"
12 when it comes to pharmaceutical distribution?

13 **A.** Yes.

14 **Q.** What does that mean?

15 **A.** So, just in time delivery, essentially, it refers to
16 the way that the healthcare delivery system works in terms
17 of pharmaceuticals and, generally speaking, and there are
18 always exceptions, of course, but generally speaking,
19 pharmacies order every single day, controls and
20 non-controls.

21 And, you know, a couple of reasons. Number one, they
22 are -- our pharmacies are looking to reduce their inventory
23 and the more inventory they keep on hand, the more that
24 costs them in terms of their cash flow. So, just as a
25 simple business requirement, it's more financially

1 beneficial to the customer to have the ability to order
2 every single day.

3 From a controlled substance point of view, it's also
4 very advantageous for that pharmacy to have the least amount
5 of inventory on hand for controlled substances. Again, what
6 we're trying to avoid there is a situation where there's
7 either internal theft at the pharmacy and the less product
8 on hand in terms of controls reduces that. And also,
9 reduces the chances of a robbery, resulting in the
10 significant loss of controlled substances.

11 I would finally add to that probably that it's just the
12 efficiency of the wholesale distributor system which has,
13 you know, permitted this situation to exist. You know, we
14 deliver almost every day to our customers and, some
15 locations, more than once a day.

16 **Q.** If an order is not delivered on time to a pharmacy, can
17 that result in harm to patients?

18 MR. PIFKO: Objection, speculation.

19 BY MS. MCCLURE:

20 **Q.** Based on your experience in the industry, Mr. May,
21 which now I believe includes --

22 THE COURT: Overruled. Go ahead.

23 BY MS. MCCLURE:

24 **Q.** -- seven years at AmerisourceBergen, if a pharmacy
25 order is not delivered timely by AmerisourceBergen, can that

1 result in harm to patients?

2 **A.** That's always our balance. You know, every decision
3 that we make ultimately could affect patient care and, you
4 know, we have the regulation on the one side. We have
5 patient care issues on the other side.

6 So, if a delivery does not arrive at a pharmacy where a
7 patient was intending to get their medication, it certainly
8 can impact them, yes.

9 **Q.** And, nevertheless, even though that a delay can cause,
10 as you've testified, have an effect on patients,
11 AmerisourceBergen, nevertheless, still holds orders of
12 controlled substances that hit our parameters, correct?

13 **A.** We do. And for our procedure, our guidance is we can
14 hold that order for at least 24 hours and more time, if
15 necessary. If we have to communicate with the customer, for
16 example, they may not respond back immediately, so we will
17 hold it for a longer period of time in that case.

18 **Q.** So, let's talk through briefly an order coming in to
19 AmerisourceBergen. An order comes in from a pharmacy. What
20 happens next?

21 **A.** Well, one of two things can happen. If it's an order
22 for controlled substances, the order can pass through
23 without surpassing any parameters and the order would then
24 be processed as normal. It would be picked, packed and
25 shipped.

1 If the order, on the other hand, surpasses the
2 established parameters, that order would be instantly held
3 in the queue, a -- what we refer to as a work flow would be
4 created and that work flow would appear in the work function
5 area of the Diversion Control Team members who review all of
6 those orders.

7 **Q.** And can anyone else at AmerisourceBergen outside of the
8 Diversion Control Team see or release an order that's been
9 held at that point?

10 **A.** No.

11 **Q.** What is that order reviewed for?

12 **A.** Well, the order is reviewed to make a determination
13 whether the order is suspicious or not.

14 **Q.** And when is an order suspicious under the regulation?

15 **A.** So, we -- as the -- relying upon the language in the
16 regulation, unusual quantities, orders that deviate
17 substantially from a normal pattern, and orders of unusual
18 frequency, that's how the regulation defines those as
19 including those. That's the language. So, anything that
20 fits that criteria.

21 **Q.** And is that, what you've just described, the only
22 definitional direction you have from DEA about what a
23 suspicious order is?

24 **A.** Yes.

25 **Q.** And who reviews orders that are held today?

1 **A.** It would be a member of the Diversion Control Team.

2 **Q.** And, briefly, what type of information do those
3 Diversion Control Team members evaluate to determine what to
4 do with that order?

5 **A.** Sure.

6 MR. PIFKO: Objection, Your Honor, just to the
7 extent we're talking about the policies and procedures and
8 there have been changes over time. I just ask that the
9 questions clearly define the time period for which we're
10 discussing.

11 BY MS. MCCLURE:

12 **Q.** Mr. May --

13 THE COURT: All right. Sustained. Go ahead.

14 BY MS. MCCLURE:

15 **Q.** Mr. May, based on your experience in the Diversion
16 Control Program, prior to making changes to the Diversion
17 Control Program, which you've briefly described, did you
18 operate and oversee the existing Diversion Control Program
19 when you joined AmerisourceBergen in 2014?

20 **A.** I did.

21 **Q.** And then, since that time, have you then overseen the
22 current Diversion Control Program to which you've made some
23 changes?

24 **A.** Yes. And those changes occur regularly, annually.

25 **Q.** Okay. And if I asked you to describe the types of

1 information the Diversion Control Team members rely on in
2 evaluating an order, would that actually have changed in any
3 way from 2014, when the program you took over existed at the
4 time you joined, through to today?

5 **A.** So, I mentioned on Friday we have the totality of the
6 circumstances test where we look at all of the information
7 we can gather around the order and much of that information
8 that was being looked at in 2014 is similar to what we look
9 at today.

10 And so, we would look at the past ordering activity of
11 that particular controlled substance by that customer over a
12 period of time to look at issues like frequency and pattern,
13 but we would also look at the other due diligence
14 information that I referenced here.

15 Right now, during 2014, when I arrived, we had
16 spreadsheets and those spreadsheets had certain data on them
17 that would contribute to the decision making process. We've
18 now converted those to our dashboards and we have that
19 information in Tableau.

20 It may be that we review the customer due diligence
21 file itself. There may be information pertinent to the
22 decision in terms of the customer base, the patient customer
23 base, being serviced by a particular location.

24 And so, much of that information has stayed the same
25 over time. How we get to that information has changed a

1 little bit in terms of what we can access.

2 And I would add, though, we have added some additional
3 information, public source data that we've incorporated into
4 our program that we did not have when I arrived in 2014,
5 just to make that distinction, that there have been some
6 additions of new information.

7 **Q.** Okay. And we'll get to that when we talk about the
8 Tableau files, but back to the order that we're evaluating
9 at the Diversion Control Team level, what happens if that
10 order is deemed by that Diversion Control Team member to be
11 suspicious?

12 **A.** The order would be cancelled, and it would be reported
13 to DEA, and it would also be reported to those states where
14 it's required.

15 **Q.** And after that order is reported as suspicious, is
16 there any other internal follow-up that happens about an
17 order that has been reported to State BOP, if required, and
18 DEA as suspicious?

19 **A.** Yes. We started the process sometime ago back when we
20 were looking at the program and we have weekly meetings, or
21 the Diversion Control Program has a weekly meeting, where
22 they review all of the previous week's Suspicious Order
23 Reports. And the purpose of that is to essentially say,
24 hey, is there anything further that we need to do relative
25 to this customer, any additional due diligence or follow-up

1 for that particular customer.

2 And, on some occasions, there is additional follow-up
3 that's required. Some occasions, we report the suspicious
4 order, we don't see any other potential red flags, and
5 that's -- we've carried out our obligation.

6 **Q.** And you said it was reported to DEA. Does anything
7 happen to that Suspicious Order Report internally at
8 AmerisourceBergen?

9 **A.** We document it. That suspicious order is documented in
10 a couple of different places. It's documented within the
11 data management platform, SAP, that we -- that the company
12 utilizes in its tracking of all of its transactions.

13 And we also document it in the customer file where we
14 can, you know, add that information from SAP to the customer
15 file. That way, when we look at a customer, the intent
16 there is to look at the whole life of the customer, which
17 would include, of course, any Suspicious Order Reports.

18 **Q.** And, Mr. May, you said that you can add it to the
19 customer file. Does that happen automatically or does that
20 require a human to remember to take that order and note in
21 the customer file that something had been reported as
22 suspicious?

23 **A.** So, we've developed a recent enhancement where, I
24 mentioned on Friday, our latest version of our document
25 maintenance system is referred to as ARCHER. And what we've

1 developed is a directed feed from SAP, this platform, where
2 the order is reported directly down into the ARCHER customer
3 file where that report would be saved.

4 **Q.** Mr. May, does the fact that a customer placed an order
5 that your team has found to be suspicious automatically mean
6 that that customer is suspicious?

7 **A.** No, it does not.

8 **Q.** In fact, are you aware of any regulatory guidance that
9 says that if a customer places an order with
10 AmerisourceBergen, that AmerisourceBergen then reports to
11 the DEA as suspicious, that customer should be considered
12 suspicious and we should stop shipping orders to that
13 customer?

14 **A.** No, that's not in the regulation.

15 **Q.** Do you have any familiarity with the new proposed rule
16 making that has been issued by DEA in 2020?

17 **A.** Yes, I do.

18 **Q.** And does that new proposed rule making address any
19 guidance with respect to the question I've just asked you?

20 **A.** It does not.

21 **Q.** Thank you. And you've said that you have a weekly
22 meeting with your team to discuss suspicious orders. Does
23 the team -- what does the team do to decide whether to have
24 a customer subject to a deeper examination?

25 **A.** Just to clarify, I don't participate in those meetings

1 and I have two directors that manage those personnel in
2 those meetings, but they -- they would review the order.
3 There would be certain information about the order.

4 There would be, of course, the customer name,
5 registration number, the drug family that was subject to the
6 order, the quantity that was involved, and some other
7 metrics around that particular customer. And they would
8 then sit as a group and review that and they may consult
9 with these dashboards, again, to see if there's any other
10 red flags and, if there are, there could be follow-up that
11 comes out of those meetings and that follow-up would be
12 assigned to a team member.

13 **Q.** And while you may not attend those meetings, do you
14 have familiarity to be able to testify today here about what
15 you -- what goes on in these meetings?

16 **A.** I do. I review the -- I see the e-mail traffic and I
17 also used to participate in those meetings, but have stopped
18 doing so.

19 **Q.** And is this the company's own initiative where these
20 weekly meetings are conducted to evaluate suspicious orders
21 or is there some DEA guidance or regulation that mandates
22 this?

23 **A.** This is our own internal procedure.

24 **Q.** And today, does the regulation require
25 AmerisourceBergen to cancel and not ship a suspicious order

1 under the regulatory definition?

2 MR. FARRELL: Objection, Your Honor.

3 THE COURT: Basis?

4 MR. FARRELL: The same basis that the defendants
5 filed a motion in limine to prevent us from opining on what
6 the regulation does or does not say.

7 MS. MCCLURE: Your Honor, Mr. May was asked
8 questions regarding his understanding of the law on Friday.

9 THE COURT: Yeah. Overruled. She asked him what
10 the regulation requires.

11 MS. MCCLURE: As to his understanding. I'm -- I'm
12 happy to make the --

13 BY MS. MCCLURE:

14 **Q.** As your understanding of the regulation, Mr. May?

15 **A.** My understanding of the regulation is that there is no
16 requirement to cancel the order, that the regulation is
17 actually silent on this issue.

18 **Q.** Okay. So, let's go back to that order at issue. What
19 happens if the order -- I'm sorry. What happens if the
20 Diversion Control Team determines that that order is not
21 suspicious?

22 **A.** They release the order so that it can go back in the
23 queue to be picked, packed and shipped. And I'm sorry I'm
24 using that language. I'm willing to explain that a little
25 bit more if that's unfamiliar to anybody.

1 **Q.** Sure, Mr. May. Can you explain what pick, pack and
2 ship means?

3 **A.** It's a term that's utilized by our Distribution Center
4 personnel that once that order is added back into the queue,
5 then they are notified electronically and their
6 responsibility is to find that particular order within the
7 Distribution Center, pick it, take it off the shelf, put it
8 into a tote, and then that tote is eventually shipped to the
9 pharmacy. Picked, packed and shipped.

10 **Q.** Okay. Let's move on to ongoing customer due diligence.

11 MS. MCCLURE: Your Honor, at this time, I'm going
12 to request to publish an exhibit, which is a dashboard from
13 2018, that has been produced to the plaintiffs.

14 Don't publish it yet, please, Richie.

15 And this is one of those documents I brought to your
16 attention on Friday which contains information that we would
17 request be broadcast in this courtroom, but that the feed to
18 the overflow courtroom for this document be halted.

19 THE COURT: And this is because it contains
20 sensitive internal information relating to your marketing or
21 something like that?

22 MS. MCCLURE: So, it's not with respect to
23 marketing, Your Honor. It's with respect to this is the --
24 it contains some information about the customer. It also,
25 in portions of the document, contains information about the

1 parameters that Mr. May has testified about that would be
2 particular to this customer; in other words, what the
3 perimeter limits would be for certain definitional
4 parameters that are in place for AmerisourceBergen as to how
5 much product that customer can order before then tripping
6 the parameters to be subject to a suspicious order.

7 THE COURT: Mr. Farrell?

8 MR. FARRELL: Objection on several grounds, Judge.
9 Number one, relevance. This dashboard has a temporal limit
10 or scope that is recent and we don't believe it's relevant
11 as to the volume of pills that was sold during -- back to
12 2007. So, to the extent that it is relevant, it's relevant
13 for a near-term temporal scope. That's number one.

14 Number two is that, again, the plaintiffs feel
15 aggrieved that the defendants are not required during their
16 direct to present to us the exhibits that they intend to use
17 the night before as we are on cross examination.

18 And, number three is if we are going to go through a
19 didactic explanation of the current OMP process which
20 includes the dashboard, we ask that the full dashboard be
21 shown and not just snippets of it so that we can evaluate
22 not just one page, but multiple pages of what information
23 they have access to.

24 MS. MCCLURE: Your Honor, may I respond?

25 THE COURT: Yes.

1 MS. MCCLURE: As to the near-term scope, as Mr.
2 May will testify, the dashboards have been in place since
3 2015 going through to the present. The information that
4 we're displaying is the information from a 2018 dashboard
5 which was produced to the plaintiffs.

6 The plaintiffs have chosen in this case to seek
7 abatement only as a forward-looking remedy. Therefore, we
8 believe that regardless of what the plaintiffs are choosing
9 to define as relevant in this case, we believe it is
10 relevant for Your Honor to understand the operation of these
11 dashboards and view them as Mr. May has described from that
12 2015 through to the present time period. Mr. May will be
13 able to describe the manner in which they may have changed
14 over time.

15 As to the second point Mr. Farrell raised regarding the
16 ruling that he is aggrieved about, I believe that Your Honor
17 has three times ruled on that. And so, at this point, I
18 don't have anything further to say except to refer to the
19 fact that Your Honor has ruled that the plaintiffs have an
20 obligation to disclose for witnesses they are calling as on
21 cross in their case documents the night before and that the
22 defendants do not.

23 As to the third point, the requesting that the full
24 dashboard be shown, we are, in fact, intending to walk
25 through the full dashboard. There are actually two. There

1 is a weekly and a monthly for each customer throughout the
2 entire program. And so, we would intend to walk through the
3 weekly and the monthly.

4 The weekly has three tabs on it. We would be viewing
5 each of those three tabs. And the monthly, I believe -- I'm
6 not looking at it. I think it has seven and we would
7 briefly walk through those, as well. So, I have no concern
8 about showing the dashboard as Mr. Farrell has requested.

9 THE COURT: Well, what -- what do you not want
10 shown here?

11 MS. MCCLURE: So, in the courtroom, we are fine in
12 light of the fact that this -- the courtroom is full of
13 attorneys who are representing parties in this litigation.
14 We would simply request that the feed for the document not
15 be broadcast to the overflow courtroom. So, that's the sole
16 --

17 THE COURT: Is there any objection to that other than
18 what Mr. Farrell said?

19 All right. Overruled. I'm going to allow it. Go
20 ahead.

21 Mr. Ruby?

22 MR. RUBY: Your Honor, just one point of procedure
23 with regard to objections. Defendants at least have
24 endeavored to, with each witness, only have one attorney per
25 party making the objections or handling the witness and we

1 would ask that plaintiffs follow the same practice. I
2 believe that Mr. Farrell and Mr. Pifko are both counsel for
3 the County here.

4 THE COURT: Well, I'm not confused or misled by
5 this. I'm going to allow this for now. If it gets out of
6 control, I'll reconsider that ruling, but I think it might
7 even be helpful for more than one lawyer to be involved
8 here.

9 So, I'm going to overrule your objection, Mr. Ruby.

10 MR. RUBY: Understood, Your Honor.

11 THE COURT: And the feed will be cut off with
12 regard to the document.

13 MR. FARRELL: Judge, for the record, we would
14 again place on the record our objection to preventing the
15 public from access, full access, to the evidence being
16 presented in this trial.

17 THE COURT: Well, I think there's a good reason
18 here to follow this procedure placed on the record by Ms.
19 McClure and I'll allow it. Your objection will be shown on
20 the record.

21 MS. MCCLURE: Thank you, Your Honor.

22 Richie, could you go ahead and publish, please,
23 AMWV-993E, which is the weekly dashboard for St. Mary's
24 Medical Center?

25 And, Your Honor, I would request that Mr. May be

1 permitted to come down off of the stand and walk Your Honor
2 through the various portions of the dashboards.

3 THE COURT: That will be fine, Mr. May, if that
4 will help with your testimony.

5 THE WITNESS: Sure.

6 THE COURT: You may do so.

7 THE WITNESS: Thank you, Your Honor.

8 MR. FARRELL: Judge, I have another objection.

9 THE COURT: Okay.

10 MR. FARRELL: We object to the use of a non-retail
11 pharmacy, which is the subject of this litigation, and
12 instead, the use of hospitals and, in fact, we're going to
13 -- if this evidence is presented, we would also like to have
14 the very same opportunity to use the dashboard to look at
15 the sales to the pharmacies in Cabell County over the past
16 several years.

17 MS. MCCLURE: Your Honor, the dashboards are
18 uniform in terms of the manner in which they work, as Mr.
19 May will testify, whether the customer is a hospital, a
20 pharmacy, et cetera. So, this is our portion of the
21 presentation. This may not be the only dashboard that we
22 show Your Honor.

23 That said, Mr. Farrell has access to evidence that we
24 have produced to him and his decision as to what he would
25 want to use is up to him.

1 THE COURT: Well, I'm going to allow him to go
2 ahead with this and, if Mr. Farrell wants to offer similar
3 evidence, we'll deal with that when it comes up.

4 So, go ahead, Mr. May.

5 MS. MCCLURE: Thank you, Your Honor.

6 BY MS. MCCLURE:

7 **Q.** So, David, I believe that your mic is now working. It
8 should be green and you can approach the screen.

9 So, Mr. May, what this document?

10 **A.** So, again, this is a dashboard that's been created and,
11 over time, the dashboard has looked a little differently.
12 This one was published with data through May 25th, 2018 and
13 you see the date on the bottom of the dashboard. We refer
14 to this as the customer dashboard.

15 And, again, to be clear, we continue to change these
16 dashboards. So, what the dashboard looks like today, in May
17 of '21, is different than what we're looking at here. There
18 have been some changes.

19 So, we'll start at the top left and kind of move around
20 the document a little bit. In looking at the top left, we
21 see DEA license number and then every -- and then, we'll see
22 four different account numbers associated with, in this
23 particular case, it's St. Mary's Hospital in Cabell County.

24 And I think I -- I believe I explained on Friday that
25 our program works to the DEA registration level. So, an

1 account can have multiple account numbers, but all of that
2 data, that purchasing data, aggregates the DEA registration
3 level. And so that's why you see four different accounts
4 here, but it all goes back to that one level.

5 Moving over to the right, we look at some summaries
6 sales metrics for a three-month period of time. You'll see
7 up at the top it says "three months as of 4/30/18". So,
8 that would have been the three-month ending on April 30th.
9 One of the things that we look at here and one of the
10 changes that we made to our program is we look at dosing
11 units of controlled substances versus non-controlled
12 substances. And, in this particular case, you see in the
13 very bottom there 1.2% of all purchasing by this customer
14 has -- during that three-month time frame has been
15 controlled substances.

16 Looking now down back to your left, we have product
17 family distribution. This actually shows us over a period
18 of 12 months all of the controlled substances that have been
19 purchased by this customer. It gives you the dosing unit
20 quantity. It ranks them one through however many families
21 they've purchased during this time period. And it shows you
22 percentages of those controls.

23 So, looking at this hospital, the top controlled
24 substance would be a Fentanyl liquid, which would be a very
25 common substance, of course, for a hospital and using it in

1 procedures. And so, that wouldn't be surprising to us.

2 You also see the parameters which Ms. McClure mentioned
3 here, the individual order parameter, and TRD perimeter for
4 this particular customer.

5 Moving over to the right, again, you see just the -- we
6 track the amount as a percentage of the dosing units of
7 controlled substances so that we can see the ebb and flow to
8 see if there's any red flag there.

9 Below that, we show the flagged orders for this
10 particular customer. So, if you hover over one of those
11 green marks, you'll see that there were two released orders.
12 So, in other words, two orders of interest. And both were
13 released during the month of January.

14 Moving all the way back to your left, customer order
15 history, now what this does is actually shows us for 90 days
16 each and every order that was placed by the customer for a
17 controlled substance. Again, looking at the date, the DEA
18 registration number. There's a unique order number. Then
19 you have the order, the product family that was ordered.
20 You have the quantities and then you have the comp and TRD
21 parameters, as well. And so, that gives us a complete view
22 of the customer for 90 days.

23 And then, finally, over to your right, order
24 distribution during 90-day period ending 5/25, so if you
25 hover over any of those dots, it will actually tell you what

1 the order was by order line and then the date, the product,
2 the 30-day quantity and the TRD perimeter for that
3 particular order.

4 And this is a way for us to get a sense, thinking back
5 now to the regulation where it talks about quantity, pattern
6 and frequency, this gives us an opportunity by looking at
7 all of that information and it's all in one place.

8 So, we may be looking at one individual order, but
9 we're considering the complete customer when we do so. So,
10 it's, again, getting back to that notion of totality of the
11 circumstances.

12 **Q.** And, Mr. May, does every AmerisourceBergen customer who
13 orders controlled substances have a weekly dashboard like
14 this one?

15 **A.** Yes. The dashboard is the same for every customer that
16 purchases controlled substances. Once they make that first
17 purchase, then this is the sort of information that would be
18 tracked.

19 **Q.** Is that true for independent pharmacies?

20 **A.** Yes, it is.

21 **Q.** Chain pharmacies?

22 **A.** Yes.

23 **Q.** Hospitals?

24 **A.** All DEA registrants that --

25 **Q.** Thank you.

1 **A.** -- place orders for controlled substances.

2 MS. MCCLURE: Can you, Richie, move to the second
3 tab on the bottom called "product trend"?

4 BY MS. MCCLURE:

5 **Q.** Can you explain what this is?

6 **A.** Sure. This gives us the opportunity if, say, for
7 instance, we wanted to focus our attention on any one
8 particular product, we could look at that particular
9 product. So, if there was a concern -- in this particular
10 case, the example that we're showing is we have a product
11 family of hydrocodone up there. And then, we look at the
12 purchasing by that customer of hydrocodone over a period of
13 time.

14 We not only look at how that looks when it's charted to
15 give us a sense of whether the order appears to be somewhat
16 regular, but we also have the ability under the customer
17 concentration on the bottom to look month over month the
18 ordering of that particular controlled substance.

19 Now, I could take this same chart. I could insert
20 other drug families. As many drug families as we have, but
21 as you can imagine, the chart gets busier as you add those
22 drug families.

23 MS. MCCLURE: And going back, Richie, to the
24 customer tear sheet tab, that first tab.

25 BY MS. MCCLURE:

1 Q. Can you describe briefly how these -- this tab looks
2 different today versus this 2018?

3 A. Sure. There are actually -- on our new customer tear
4 sheet, there are actually three tabs on the bottom. And
5 what's missing here that we've incorporated into our program
6 is a customer risk scoring, customer risk matrix. So, we
7 brought in outside data sources and now, if I were to pull
8 up this customer's current dashboard, there would be a risk
9 ranking, a risk ranking for this particular customer
10 compared to his peer group, and a risk ranking for this
11 particular customer in this county.

12 Q. Thank you.

13 MS. MCCLURE: Your Honor, I move the admission of
14 a pdf screenshot of these Tableau files. Just for technical
15 reasons, viewing Tableau files in their native format is
16 somewhat difficult because you need to download protocol,
17 programs, but we would, at this point, move for the
18 admission of pdf copies of this weekly dashboard for St.
19 Mary's Medical Center.

20 THE COURT: Is there any objection to that?

21 MR. FARRELL: Judge, aside from procedurally our
22 continued objection, this is a screenshot pdf of an
23 electronic file that was produced in discovery. I will note
24 that we have attempted to take similar summaries of similar
25 datasets that this Court has rejected. Nonetheless, we have

1 no objection to the entry of this document into the record.

2 THE COURT: All right. It's admitted.

3 MS. MCCLURE: So, Your Honor, just briefly.

4 COURTROOM DEPUTY CLERK: Number?

5 MS. MCCLURE: It's 993E. So, it's an excerpt from
6 the Tableau files. 993E.

7 (Discussion held off the record)

8 THE COURT: If I admit this, it's going to be in
9 the record. You're concerned about publishing it, aren't
10 you?

11 MS. MCCLURE: Your Honor, so, at the same time I
12 had made that request on Friday, thank you for bringing that
13 to my attention, we had requested that we be able to submit
14 documents with accompanying -- accompanying a brief, Your
15 Honor, to briefly address the sealing of the particular
16 documents that we would not be broadcasting to the overflow
17 room. So, that -- we would request that we have the ability
18 to submit that brief at the conclusion of the day.

19 THE COURT: Okay. So, this -- well, what do you
20 want me to do? If this is admitted --

21 MS. MCCLURE: How about we -- could we do this,
22 conditionally admit the document subject to our brief so
23 it's not technically, quote, "in the record" until we submit
24 that brief to requesting under seal treatment?

25 THE COURT: That's the way we'll handle it. It

1 will be conditionally admitted subject to reviewing the
2 submissions on it.

3 Mr. Farrell?

4 MS. MCCLURE: Thank you, Your Honor.

5 MR. FARRELL: I have a responsibility to make a
6 record.

7 THE COURT: Mr. Farrell?

8 COURT REPORTER: Mr. Farrell, is your mic on?

9 MR. FARRELL: Yes, it is.

10 COURT REPORTER: Okay, sorry.

11 MR. FARRELL: I'm sorry.

12 COURT REPORTER: That's okay.

13 MR. FARRELL: Judge, again, if this is evidence
14 used to -- by the defendants to rebut the claim brought by
15 the public for a public nuisance cause of action that you
16 intend to rely upon, we believe the public has a right to
17 see the evidence in which -- upon which your ruling will be
18 based.

19 MS. MCCLURE: Your Honor, I'd be happy to address
20 that again, if you'd like.

21 THE COURT: Well, yeah. I'm -- I'll overrule that
22 objection for now having conditionally admitted the document
23 and going to deal with this when I see your submissions.

24 MS. MCCLURE: Thank you, Your Honor.

25 And, Richie, could we pull up the monthly dashboard for

1 St. Mary's, which is 942E?

2 BY MS. MCCLURE:

3 Q. And, Mr. May, what is this document?

4 A. So, this is our monthly --

5 MS. MCCLURE: Sorry. I just wanted to confirm
6 that this similarly is not being broadcast, correct? Thank
7 you.

8 THE WITNESS: This is a monthly dashboard and it
9 has several components. The last dashboard that we looked
10 at was more customer centered. This dashboard actually has
11 several tabs and it lets us look at and help us manage our
12 overall program.

13 And so, to the extent that it deals with particular
14 customers, there's one tab, which we'll get to, that says
15 "Customer Detail Report", but I would start with the first
16 tab here where it says "OMP Summary" and, again, as we've
17 discussed earlier today, ours is a national program. And
18 so, what I'm looking at here is national data.

19 And, again, just to point out on the bottom, it says,
20 "Data through 5/31/18". And so that's our period of time.

21 And what we look at here, again, is helping us to
22 manage us to manage our OMP -- our OMP Program in and of
23 itself. So, what we're looking at here in the right-hand
24 column under "Key OMP Metrics", it's giving us metrics for
25 the month of May, but then, it's comparing those metrics

1 against the 12-month average.

2 So, in the month of May, there was 858 million dose
3 units ordered nationally versus the 12-month average, which
4 was 852-plus million dosage units.

5 And so, and then if you go down the column, and I don't
6 have to read for everybody, but it just tells you what that
7 looks like in terms of orders placed, in orders flagged, and
8 percentage of orders flagged, reported orders.

9 The active DEA licenses, remember, I said earlier that
10 the program works to the DEA registration level. So, and
11 there was a question, I believe, on last Friday around how
12 many customers that we support for controlled substances
13 sales and my answer was about 22,000.

14 You see here in May, 22,400 registrations. The
15 12-month average is 21,296. And to be clear,
16 AmerisourceBergen has many customers that never order
17 controlled substances. So, they would not be reflected in
18 this data at all.

19 And then, finally, "Impact to DEA" probably needs some
20 explanation. What that means is out of those 22,400 in the
21 month of May, 2,400 of them were impacted by a program; in
22 other words, they had an order of interest that was held.

23 We then track that same information in terms of
24 charting and on the -- on the right top, you see "Orders
25 Flagged". I believe I mentioned on Friday, if I didn't,

1 I'll mention it here. Our program, the current version of
2 order monitoring is risk based and we look at all of our
3 drug families in terms of risk, high risk, medium risk and
4 low risk. And that's a metric that we like to track.

5 And, of course, we're trying -- what we're trying to do
6 there, is we're trying to force our attention electronically
7 at those product families that are at the most risk; of
8 course, without ignoring those ones that are on the lower
9 risk scale.

10 On this particular chart, you see there's a -- an
11 increase in the number of medium risk products and you would
12 say, well, you know, that kind of runs counter to what
13 you're saying then in terms of risk.

14 In fact, you know, I'm familiar with -- business
15 occurrences happen all the time that we have to manage
16 through OMP. This particular period of time, Walgreens had
17 shifted their purchasing, their direct purchasing of
18 pseudoephedrine products listed chemicals, over to
19 AmerisourceBergen and when you make a change in the business
20 like that with that ordering, that pattern and the
21 quantities, when you make a change like that, now we're
22 going to see those orders hitting our system until the
23 system learns this new business. So, this is just, you
24 know, one aspect of the thing -- things we try to manage in
25 the order monitoring.

1 On the bottom, you see a heat map that is of the
2 country and it's by distribution center. And that's just
3 reflecting the number of orders reported. On the dark end
4 there's more orders reported by the distribution centers
5 servicing those customers and on, of course, the left end,
6 the lighter end, there are less.

7 **Q.** And, Mr. May, how does this --

8 MS. MCCLURE: I'm sorry. Can we go to the second
9 tab, Richie, product trend?

10 THE WITNESS: Again, looking at our program
11 nationally, one of the things that we like to do is, is
12 there some emerging -- emerging drug of concern in terms of
13 controlled substances? And so, what we do is we look
14 specifically at any changes over time. So, we're looking at
15 dosage units distributed.

16 And, again, we see it on the top where we always break
17 it down, high risk, medium risk, low risk. We look at the
18 orders placed in terms of the raw numbers. We always try to
19 add a percentage to it, flagged orders and reporting orders.

20 And then we chart those. We chart those same figures
21 in terms of looking at percentage change.

22 So, if you want to hover over one of those dots, you
23 can see that represents -- so, right there, we're looking at
24 PG, the Pregabalin family, and we're seeing an 8.3% increase
25 during this period of time.

1 Moving to the right, same notion where we're looking
2 now at not the dosing units, but the flagged orders. And
3 so, if you want to just hover over one of those flagged
4 orders, you can see here the hydrocodone family and the
5 percentage of orders flagged has increased by 4.13% and we
6 actually have a raw number, 209, that represents that 4.3%.

7 Going down to the bottom, product family breakdown,
8 again, we look and we have -- I mentioned 70 -- 70 drug
9 families that we monitor and this just shows you over time
10 what that looked like.

11 So, you see the dosage current and then next to it
12 would be three-month average. And, again, our goal here is
13 always to understand the trending of that information.

14 BY MS. MCCLURE:

15 **Q.** And how about the third tab, individual product
16 dashboard?

17 **A.** Here, the -- again, we focus on a particular product.
18 Again, we've highlighted it for purposes of today's
19 discussion on hydrocodone solid. I could plug in any of my
20 70 product families here and we look at those same exact
21 figures and we chart them in terms of dosage units by months
22 and percentage of orders flagged.

23 On the bottom, the difference here is we look at our
24 complete customer base in terms of looking at this
25 particular -- at this particular drug family hydrocodone.

1 So, it's a little more detailed, a little more customer
2 centered.

3 **Q.** Okay. And the next tab, orders of interest?

4 **A.** Again, there's a lot of data here, a lot of data
5 points, and I don't want to -- I don't want to get too much
6 into the weeds, but I guess I would point -- you know, for
7 me, what is significant is up in the left-hand order,
8 percent of flagged orders, and this is always something that
9 I go back to. You know, how is the program working in terms
10 of percent of orders flagged and you see that, in May, 41%
11 of the orders flagged was for high risk. 31% for medium.
12 27 for low.

13 So, for me, that's an appropriate distribution because
14 we're now -- what that means is we're now focusing our
15 review on those orders that are of the most high risk.

16 **Q.** Mr. May, one quick question. The tab is called Orders
17 of Interest. Up on the left, it says "Flagged Orders". Can
18 you tell is -- are those the same things, those terms?

19 **A.** They are the same thing. Prior to 2014, the language
20 of the program was flagged orders. After we did the
21 enhancements and starting, you know, midway through 2015, we
22 referred flagged orders as orders of interest.

23 **Q.** Okay. Anything in particular on this dashboard in
24 addition?

25 **A.** You know, I'd point to our adjudication reasons. One

1 of the things that we tried to do with our program is to put
2 more definition around the documentation of the work when it
3 came to suspicious orders so that if we do communicate with
4 DEA, when we file that report, if DEA comes back to us and
5 they want more information by the customer, of course, we
6 have access to everything that we've looked at here today,
7 but it's just another -- it was another effort by us to try
8 to make the documentation a little bit more robust on that
9 point.

10 Q. Okay. And the --

11 THE COURT: When you get to a stopping point, we
12 need to --

13 MS. MCCLURE: Okay.

14 THE COURT: -- switch out the court reporters and
15 take a break.

16 MS. MCCLURE: Your Honor, we would be fine to
17 pause at this point, do that, and pick this up after our
18 break.

19 THE COURT: Okay. We'll be in recess for about
20 ten minutes.

21 (Recess taken)

22 MS. MCCLURE: Your Honor, request permission for
23 Mr. May to continue with the examination with the lapel mic,
24 and just wanted to confirm that this would still not be
25 broadcast to the overflow.

1 THE COURT: Yes, you may.

2 BY MS. MCCLURE:

3 Q. Mr. May, so we were on this Orders of Interest tab.
4 Anything else to address on this before we move to
5 Customer Risk Metrics?

6 A. I think we can move on to the Customer Risk Metrics
7 tab. Thank you.

8 Q. And what is this -- what does this dashboard display?

9 A. This represents the beginning of our process in terms
10 of assigning risk to our customers. And, and we have about
11 10 different data points that we look at around our customer
12 in terms of assessing risk.

13 And we would assess the risk of the customer and then
14 we would assign a customer a score. And that way, we could
15 look at any particular -- I could focus on any particular
16 area on the map.

17 If you just kind of hover over a state, and it would
18 give you -- in this particular matrix what we're looking at
19 here in this data is we've taken one of those risk points,
20 and that is percentage of OY of OX. And what that means is
21 percentage of oxycodone 30-milligram which we separated into
22 its own family, and we're comparing that against all of the
23 oxycodone sales to that particular customer over a period of
24 time. And, and then we're looking at that.

25 So in the State of Utah right now, generally speaking,

1 that, that rate is about 12.38 percent. So it gives us an
2 idea of what that percentage looks like on a state by state
3 basis. And, of course, we've added color coding. So if you
4 go down to Texas, you see that, that dark of a color, the
5 higher that particular point. And, and --

6 **Q.** Mr. May, just on an overall aggregate basis for the
7 state, not as to a particular customer?

8 **A.** This is looking across the state. Now, on any one of
9 these states, then, we could click on the state and then
10 drill down into the particular customer right down to the
11 county level for, for this same particular metric.

12 If you look at the bottom of the, of the data points,
13 you see customer, scorecard, metrics. And, and I mentioned
14 there were about 10 items that we look at when assessing
15 this particular score, and you see some of those there.

16 The first we've already mentioned, and that is
17 percentage of 30-milligram, 30-milligram oxycodone versus
18 all oxycodone. But you'll see -- I'm going to work from the
19 right to the left, and if you hover over those at the top on
20 the lines. Okay. It doesn't give you anything.

21 So CDC overdose rate. I mentioned earlier that we
22 brought in some public data sources and we overlaid those
23 public data sources over our own data and to get, again, any
24 information that, that we could gather that would be
25 helpful. And those CDC overdose rates have now been

1 incorporated into our dashboard.

2 Now move right to left, please. High risk per capita.
3 So what we're looking at here is the high risk dosing units
4 down to the county level. And we've also incorporated
5 population rates into our data. So we look at that on a per
6 data, per data basis.

7 Keep moving upward. You can keep moving. I'm happy to
8 explain these, but I'm trying to not bury everybody in data
9 if that's okay.

10 Move to the left. Percentage change orders placed. So
11 if we now see this customer and the customer is ordering
12 more controlled versus non-controls, that's -- we want to
13 understand why that's happening. When we see the growth of
14 a customer, we would expect to see balance growth unless, of
15 course, they had a particular patient population that was
16 causing them to grow differently.

17 Move to the left, please. Again, looking at percentage
18 of flagged orders and -- across the state and that would be
19 a metric that would -- if we had more customers that were
20 getting flagged, that would play into it.

21 Keep moving left. Percentage of high risk. Again,
22 remember our program always goes back to the risk bases of
23 drug families, so percentage of high risk that were being
24 flagged.

25 Move to your left, please. And, again, we're looking

1 at changes. So if there's -- this would be a change in the
2 percentage of CS versus Rx, again looking at any sort of
3 trending like that.

4 And all of these metrics together, they're all
5 weighted. So they're not all given a separate weight. We
6 actually have calculations that we make. And based upon --
7 so some of these methods may have more weight than others.
8 But we generate a raw score of all of this and then we give
9 the customer a final score.

10 And, again, it's a risk score so that we can look at it
11 instantly and say, well, if this customer X has a risk score
12 that's much higher than customer Y, then we want to
13 understand those things.

14 **Q.** Okay. And, Mr. May, has anyone assisted
15 AmerisourceBergen with these dashboards?

16 **A.** Yes. We've partnered with FTI I mentioned on Friday
17 has been our outside consultant. And we have partnered with
18 them since 2014, and we continue that partnership through
19 today.

20 **Q.** And the next tab, Customer Detail Report, we'll run
21 through these last three quickly.

22 **A.** So, again, most of what we were seeing before was
23 program information, so across the country we could drill
24 down on any of it and get to the customer level.

25 But what we've done here is we've just taken our St.

1 Mary's and we're looking at St. Mary's on a different
2 dashboard now. And, again, it has more visuals. It lets us
3 look at different things, including the scorecard metrics
4 that we just talked about.

5 We also can look at high, medium, low risk products.
6 And, you know, we add color to them to help these reviews to
7 take place more efficiently.

8 So those red product families, those all represent high
9 risk. So we want that sort of thing to jump out to the
10 investigators.

11 **Q.** Okay. How about the next tab, Program Maintenance?

12 **A.** Again, in terms of working with FTI, in terms of
13 looking at the data, there's certain data requirements that
14 we have.

15 For example, if we have a brand new customer that we do
16 not have ordering data for, we would want to establish a
17 90-day history with that customer. We have certain
18 requirements for a certain number of orders before we would
19 stop assigning that customer parameters. And that would be
20 one example of how we manage the program.

21 **Q.** Okay. And the next tab, Geographic Metrics.

22 **A.** Again, you could hover over any one of these states
23 and, and it's going to show you the risk measured for the
24 state. If you click on the state, it would bring it down to
25 the county level. If we click on the county level, it's

1 going to give you every customer we're servicing in that
2 county.

3 So it's just another way for us to use the customer
4 risk, customer risk metrics that I talked about. I talked
5 about the overdose death rates. The other one that would be
6 included in addition to population would be the prescriber
7 Medicare Part B prescribing rate.

8 **Q.** Okay.

9 MS. MCCLURE: Your Honor, at this time, I move the
10 admission of 942-E, the monthly dashboard for St. Mary's
11 conditionally dependent on the submission of the brief that
12 we've previously discussed.

13 THE COURT: Any objection?

14 MR. FARRELL: I'm hesitant to say anything, Judge.
15 Obviously, we spent two and a half days laying -- trying to
16 lay a foundation for the admission of similar data metrics
17 that this Court has conditionally admitted. So we have no
18 objection to this being conditionally admitted as well.

19 THE COURT: All right, it's admitted.

20 MR. HESTER: Your Honor, just so the record is
21 clear, these are not similar data metrics to the ones we
22 were discussing with Dr. McCann. They're quite different.
23 These are, these are screen shots out of a database. I just
24 wanted the record to be clear on that.

25 MS. MCCLURE: Your Honor, Mr. Hester stole what I

1 wrote down here which is "not similar." So I would join in
2 that response to Mr. Farrell.

3 THE COURT: All right. It's admitted.

4 BY MS. MCCLURE:

5 Q. Mr. May, on the confidentiality of those materials,
6 does AmerisourceBergen treat those dashboards as
7 something that is confidential?

8 A. Yes, we do.

9 Q. And why is that?

10 A. The dashboards contain certain information,
11 particularly around our parameters, in the order of the
12 behavior. And we, we've made a significant amount of effort
13 to make sure that we keep that information private.

14 I believe that's probably what the regulator would
15 expect from us is to keep that proprietary information
16 private. And we certainly don't want to create a situation
17 where if there is some nefarious registrant out there, we
18 don't want to supply them with any information that would
19 allow them to defeat our system.

20 Q. So is the concern that information on that detailed
21 level about how the program operates as to particular
22 customers could theoretically allow a customer who learns
23 that information to evade the system?

24 A. It could, uh-huh.

25 Q. Okay. Moving on --

1 Richie, if we can put back up that Diversion Control
2 Program demonstrative.

3 Moving on to Policies and Procedures, you mentioned the
4 Policies and Procedures needed to be changed when you worked
5 to update the program.

6 THE COURT: Can we put the screen back on at this
7 point?

8 MS. MCCLURE: Oh, yes. I'm sorry. Yes, Your
9 Honor, the screen can be displayed. Thank you for that
10 reminder.

11 So can we hand out the Policies and Procedures, please?

12 Your Honor, may I approach?

13 BY MS. MCCLURE:

14 **Q.** Mr. May, what is this document that I've presented
15 to you? Or I'm sorry. Let me rephrase that. What are
16 these documents that I have presented to you?

17 **A.** These documents are Diversion Control Program Policies
18 and Procedures that were effective January 1st, 2017.

19 **Q.** And are these Policies and Procedures kept in the
20 ordinary course of business of AmerisourceBergen?

21 **A.** Yes, they are.

22 **Q.** And do these reflect the current Diversion Control
23 Program Policies and Procedures?

24 **A.** The, the process -- we have an annual process where we
25 review and update Policies and Procedures. And, so, there

1 are -- there have been revisions to these particular
2 Policies and Procedures which are dated January 1st, 2017.

3 **Q.** Are these Policies and Procedures substantially similar
4 to what's in today's Policies and Procedures?

5 **A.** Yes.

6 MS. MCCLURE: Your Honor, I move the admission. I
7 note additionally that these -- this document I will include
8 as well in today's brief with respect to confidentiality of
9 the program and how the program and system works at
10 AmerisourceBergen.

11 So I would move the admission of AM-West Virginia-00064
12 conditionally for confidentiality reasons. I will include
13 that in the submission with the Tableau files.

14 THE COURT: So you say the diversion policy is
15 confidential as well?

16 MS. MCCLURE: Yes, Your Honor. And to the extent
17 that they address certain elements of the program, we may
18 evaluate this and determine that we would simply redact
19 portions of it as -- instead of having the entire document
20 be confidential. And we would include the reasons and
21 rationale for that in our submission.

22 THE COURT: All right. Is there any objection to
23 me conditionally admitting this at this point?

24 MR. PIFKO: No, Your Honor.

25 THE COURT: It's admitted.

1 MS. MCCLURE: Thank you.

2 BY MS. MCCLURE:

3 Q. David, you can set that aside.

4 And then turning to training, you've already discussed
5 some of the current training in direct on Friday.

6 Mr. May, --

7 So, Richie, if we could put up the next slide for
8 Diversion Control Program Over Time.

9 After you started at AmerisourceBergen, you talked
10 about making some changes. Why did you decide to revise
11 certain portions of the Diversion Control Program?

12 A. It's a continuous process. Overseeing a regulatory
13 program should be a continuous process where we, you know,
14 self-assess, self-evaluate what we're doing year over year.
15 There could be many reasons to do so.

16 There could be changes in drug abuse trends. A lot of
17 our focus has been on opioids. But if you look
18 historically, there has been wide, wide changes in drug
19 abuse trends. And there may be changes in the regulations.
20 We mentioned earlier today that DEA proposed a new wording
21 around the suspicious order regulation.

22 And, so, for these reasons, we should constantly be
23 evaluating our programs and developing them.

24 Q. And, so, I will ask you about some of the changes that
25 you made. But, first, can you put yourself back at the time

1 when you joined AmerisourceBergen in March of 2014 and tell
2 us your overall impressions of the Diversion Control Program
3 that was in place when you arrived?

4 **A.** Again, many of the things that they were doing are
5 things that we're doing today. And, so, I feel that they
6 were operating a good program. And, you know, where we had
7 opportunities to make changes and improvements, we went
8 ahead and did so.

9 **Q.** Based on your experience, did you believe that the
10 program that AmerisourceBergen was operating when you
11 arrived in 2014 met AmerisourceBergen's regulatory
12 requirements?

13 **A.** Yes.

14 **Q.** Okay. Looking at New Customer Due Diligence, are there
15 any changes you have not talked about that you've made to
16 New Customer Due Diligence since 2014?

17 **A.** We instituted one change where if we had a customer
18 that we discontinued servicing, in order for that
19 customer -- that customer could re-apply with
20 AmerisourceBergen over time.

21 Originally, we would have a six-month waiting period in
22 terms of conducting New Customer Due Diligence on that
23 customer. Now it is a period of 12 months before the
24 customer can re-apply with AmerisourceBergen.

25 And we would treat them as a new customer except for

1 knowing that we had discontinued sales. And we would
2 continue that and we would consider that as well in our
3 review process.

4 **Q.** Mr. May, while we're talking about due diligence files,
5 does DEA ever ask AmerisourceBergen to provide due diligence
6 files to the DEA?

7 **A.** Yes.

8 MS. MCCLURE: And if we could hand out document
9 AM-WV-00121.

10 Your Honor, may I approach?

11 BY MS. MCCLURE:

12 **Q.** Mr. May, what's the date of this email chain that
13 I've handed to you?

14 **A.** The date is Thursday, September 24th, 2015.

15 **Q.** And does this relate to DEA's request for certain due
16 diligence files for Cabell County customers in 2015?

17 **A.** For Cabell County and other locations, yes.

18 **Q.** Thank you for that correction, other locations as well.
19 And one of the locations -- can you read the first location
20 that's a bullet point in that list of locations?

21 **A.** Sure. Pharmacy Associates, 1308 --

22 **Q.** Go ahead.

23 **A.** 1308, 4th Avenue, Huntington, West Virginia.

24 **Q.** Okay. And can you move down to Continuum Care? Is
25 that also in Huntington?

1 **A.** Yes, it is.

2 **Q.** And how about McCloud?

3 **A.** Yes, it is.

4 **Q.** And Walgreens in Barboursville, do you have an
5 understanding as to whether that's in Huntington, Cabell
6 County?

7 **A.** I believe Barboursville is in Cabell County, yes.

8 **Q.** And how about the Drug Emporium?

9 **A.** That one as well, yes.

10 **Q.** Okay. And after requesting these files, did DEA follow
11 up with AmerisourceBergen and instruct you to stop servicing
12 any of these accounts?

13 **A.** No.

14 **Q.** Did DEA follow up with AmerisourceBergen and say you
15 should make any changes at all to how these accounts in West
16 Virginia or any of these other accounts should be serviced?

17 **A.** They did not.

18 **Q.** Thank you. You can put that aside.

19 MS. MCCLURE: Your Honor, I move for the admission
20 of AM-West Virginia-00121.

21 THE COURT: Any objection?

22 MR. PIFKO: No objection, Your Honor.

23 THE COURT: It's admitted.

24 BY MS. MCCLURE:

25 **Q.** Okay. Moving on to the program over time, the

1 Order Monitoring Program, briefly, David, we've --
2 Mr. May, we've talked about some of these elements.
3 After you joined the company in 2014, did you take any
4 trips or have any meetings with the regulator shortly
5 after joining?

6 **A.** I, I had a couple of meetings with DEA shortly after --
7 well, one was shortly after joining AmerisourceBergen.

8 **Q.** And which -- where was that meeting held?

9 **A.** Met with DEA in Louisville, Kentucky, at their office
10 per their request.

11 **Q.** And do you recall the month of that meeting?

12 **A.** I started in March. I believe the meeting was in
13 April.

14 **Q.** Okay. And who attended that meeting from DEA?

15 **A.** There was a gentleman named Martin Redd and he worked
16 for the Diversion Control Section at Louisville DEA. There
17 was another state and local officer who worked with Mr. Redd
18 that Ms. Marcum who accompanied me from AmerisourceBergen
19 recognized. And there may have been one other gentleman
20 there.

21 **Q.** What was Ms. Marcum's role when she attended this
22 meeting with you?

23 **A.** Ms. Marcum is the Regional Director who had oversight
24 responsibility for our Louisville distribution center at
25 that time.

1 Q. Do you know where Ms. Marcum resides?

2 A. She resides in Kentucky.

3 Q. And do you recall Ms. Marcum sending an email
4 summarizing this meeting soon after it concluded?

5 A. I do.

6 Q. Okay.

7 MS. MCCLURE: If we can hand out that document.
8 Your Honor, may I approach?

9 THE COURT: Yes.

10 BY MS. MCCLURE:

11 Q. Mr. May, do you recognize that document I've handed
12 you as Ms. Marcum's summary of the meeting that you had
13 with the DEA diversion investigator in Louisville,
14 Kentucky, as well as the state law enforcement
15 personnel?

16 A. Yes.

17 Q. And are you copied on this email?

18 A. Yes, I am.

19 Q. Okay, and if we could display this email, Richie, and
20 if you could pull up those, the two paragraphs beginning
21 with "Mr. Redd" and with "David May." And -- thank you.

22 MR. PIFKO: Your Honor, we object on hearsay
23 grounds to the extent that they're relying on the truth of
24 the matter of any of the DEA statements that were made at
25 this meeting.

1 THE COURT: Well, that's right, isn't it,
2 Ms. McClure?

3 MS. MCCLURE: Your Honor, this is not hearsay.
4 This is offered to show the effect on the listener, provide
5 notice to Mr. May regarding the DEA's expectation and his
6 state of mind as to what was expected.

7 THE COURT: So it comes in for the limited purpose
8 of showing notice to Mr. May. And who's Mr. May? David May
9 is this fellow; right?

10 MS. MCCLURE: That's correct, Your Honor.

11 THE COURT: I'll admit it for the limited purpose.

12 BY MS. MCCLURE:

13 **Q.** Okay. Mr. May, if you could read the first
14 sentence there that begins, up on the screen, with "Mr.
15 Redd."

16 **A.** "Mr. Redd advised us that the main reason that he
17 wanted the meeting was due to the new process that DEA
18 headquarters has implemented for his office. He now
19 receives a monthly report from headquarters that contains
20 all the rejected orders by ABC in his region and he is now
21 required to respond to headquarters with an explanation as
22 to why they were reported as suspicious."

23 **Q.** Okay. Was Mr. Redd then asking you why certain orders
24 had been reported as suspicious by AmerisourceBergen?

25 **A.** Yes. Generally, Mr. Redd was trying to understand the

1 program that we had in place to identify and report
2 suspicious orders and was -- and we made a presentation to
3 him on that -- during that meeting on how the program worked
4 at that time.

5 **Q.** And do you have -- the paragraph -- I'm sorry. The
6 sentence that begins, "He was satisfied with the information
7 we provided," does that comport with your recollection of
8 the meeting as well?

9 MR. PIFKO: Objection to the extent that they're
10 trying to take testimony on Mr. Redd's state of mind.

11 MS. MCCLURE: I'm asking for Mr. May's
12 understanding of his impression of whether he believed that
13 Mr. Redd was satisfied with the information provided during
14 that meeting.

15 THE COURT: Overruled. I'll let him answer.

16 THE WITNESS: My understanding that Mr. Redd and
17 the other participants was -- were satisfied with the
18 information that we provided during that meeting.

19 BY MS. MCCLURE:

20 **Q.** Okay. And if you could read the second paragraph
21 in full.

22 **A.** Starting with "David May"?

23 **Q.** Yes, I'm sorry, starting with, "David May also
24 advised."

25 **A.** "David May also advised Mr. Redd that he is currently

1 reviewing the overall program to determine if there are
2 revisions that need to take place. He explained that in
3 many cases he feels we are over-reporting. He assured them
4 that we are continuing to review the program and are making
5 adjustments to strengthen our program as we see necessary."

6 **Q.** Mr. May, what did you take away from this meeting with
7 Mr. Redd and the state and local law enforcement officials
8 in Kentucky?

9 **A.** So putting it in context, this was barely a month after
10 I had arrived at the company and we were trying to again
11 take a close look at what we were doing, what we were doing
12 around order monitoring and how we were doing it.

13 And, so, one of the things that, at least from my
14 perspective, I wanted to be able to sit with the DEA at a
15 meeting like that and provide meaningful information,
16 meaningful action or information.

17 And, so, at that time, part of my review going forward
18 was always going to be with a mind-set, you know, we're,
19 we're satisfying the regulation. We're reporting orders.
20 But I also want those orders to be something that the
21 regulator can rely on to take whatever action the regulator
22 deems necessary.

23 **Q.** Did any other field officers contact you around this
24 time asking you also to explain why the orders that
25 AmerisourceBergen had been reporting were, in fact,

1 suspicious?

2 **A.** Yes. Shortly after -- maybe a month or so, I received
3 an email from -- actually Jacksonville. I believe it was
4 Jacksonville DEA had reached out. And then that mail
5 eventually found its way to me.

6 **Q.** Okay.

7 MS. MCCLURE: And if we could hand out
8 AM-WV-00792.

9 Your Honor, may I approach?

10 THE COURT: Yes.

11 BY MS. MCCLURE:

12 **Q.** Mr. May, is this the email chain that you were just
13 discussing?

14 **A.** Yes.

15 **Q.** Okay. If you turn to the second page of the email,
16 about halfway down there's an email to you from Angela Lee.
17 Who do you understand Angela Lee to be?

18 **A.** Angela Lee is a DEA diversion investigator, or was
19 at -- assigned to Jackson [sic] district office at the time
20 of this writing which was June 17th, 2014.

21 **Q.** Okay. And, in general, what did you understand her to
22 be asking for?

23 **A.** Very similar information as to what the Louisville DEA
24 was asking for in terms of trying to understand what the
25 suspicious order reports were that were in her area of

1 responsibility to try to understand AmerisourceBergen's
2 process. And it's very similar to what was being asked in
3 Louisville.

4 **Q.** And based on this email chain, do you have an
5 understanding or do you recollect speaking with Ms. -- I'm
6 sorry -- Ms. Lee?

7 **A.** I, I know that it looks like we set up a call. I don't
8 have a specific recollection of that conversation.

9 **Q.** But the email indicates to you that a call did occur?

10 **A.** Yes.

11 **Q.** Okay.

12 MS. MCCLURE: Your Honor, I move the admission of
13 AM-WV-00792.

14 THE COURT: Any objection to 792?

15 MR. PIFKO: Only object to the extent that they're
16 relying on the truth of the matter of any DEA statements in
17 the email. Aside from that, we don't have an objection.

18 THE COURT: What about that, Ms. McClure?

19 MS. MCCLURE: Your Honor, I'm -- at this point,
20 it's the same as the last document. This is intended to
21 offer to show the effect on the listener and information
22 that was conveyed.

23 THE COURT: All right. I'll admit it for that
24 limited purpose. It shows the state of mind of DEA. Right?

25 MS. MCCLURE: Yes, Your Honor, state of mind of

1 DEA in requesting these documents and the effect on that --
2 of that, on -- the effect of that on Mr. May.

3 Richie, could we put back up the Diversion Control
4 Program Over Time with OMP highlighted?

5 BY MS. MCCLURE:

6 **Q.** David, let's talk about peer grouping. Can you
7 talk briefly about -- I believe you've testified about
8 peer grouping in the Order Monitoring Program. Can you
9 explain to the Court how that works?

10 **A.** Sure. The notion behind peer grouping is when thinking
11 about comparing an order by a customer to another customer's
12 order, which is similar to the way the program operates, we
13 would want to compare like customers.

14 And, so, think of, for instance, a retail pharmacy.
15 Does a retail pharmacy place orders the same as a
16 practitioner? They do not. The, the products that are
17 ordered are different and, and the nature of the orders in
18 terms of frequency and volume are different.

19 And, so, what we have as a component of our Order
20 Monitoring Program is this notion that we peer group our
21 customers together. And for the retail class of trade,
22 pharmacies, that peer grouping has looked differently over
23 time.

24 **Q.** So how do you -- how many customer types are there
25 today?

1 **A.** There are approximately I would say seven off the top
2 of my head.

3 **Q.** And this peer grouping that you mentioned, do you
4 understand, based on your experience operating the program
5 that was in place from 2014 -- when you joined the company
6 as to whether that program also had peer grouping?

7 **A.** They did have peer grouping in 2014.

8 **Q.** And are there more or less peer groups today?

9 **A.** There are more peer groups today.

10 **Q.** How many peer groups are there today?

11 **A.** Approximately seven.

12 **Q.** I'm sorry.

13 **A.** Uh-huh, in terms of registration type, uh-huh.

14 **Q.** Okay. And then how about sizing of customers?

15 **A.** So, so there are several ways in which we peer group.
16 And if you look at how we establish a peer group, the first
17 thing we look at is the DEA activity code that is assigned
18 to the registrant by DEA.

19 And, so, for example, is the registrant a pharmacy? Is
20 that the activity code that's been assigned? So, so that's
21 one way we group.

22 The next way we group is by the size of the customer.
23 And if you -- when I say the size of the customer, we've
24 looked at that differently over time. But presently how we
25 determine the size of the customer is we look at the total

1 non-controlled dosing units that were purchased by the
2 customer during the most recent 12-month period which we
3 refer to as a baseline. And that establishes the size.

4 We also have a geographic risk component which is an
5 add-on in the last two years that also determines the -- in
6 terms of the -- one of the parameters, it reduces the
7 parameter of size based upon the distribution center to
8 which the customer is aligned.

9 **Q.** So a mid-size retail pharmacy in Cabell County, how
10 would peer grouping work to compare that mid-size customer
11 Cabell County orders to what?

12 **A.** So it could be compared within the county, but it can
13 also be -- the peer group works at the distribution center
14 level. So we would look at the particular servicing
15 distribution center. In this case, it would be in Ohio.

16 And we would look at -- in terms of retail pharmacies,
17 we have 10 sizes which we refer to as deciles. And within
18 each decile there's a number of dosing units that determines
19 the size of the customer.

20 So if we looked at a size -- let's say we looked at a
21 size 5 decile retail pharmacy, we would compare -- in terms
22 of the cumulative volume parameter, we would compare that
23 size 5 pharmacy to another size 5 pharmacy being serviced by
24 our distribution center out of Ohio.

25 **Q.** So am I correct that if there's 27 distribution centers

1 and 10 sizes today that there are 270 peer groups?

2 **A.** You would have been correct two years ago. We changed
3 that particular peer grouping size by adding the risk, the
4 geographic risk component.

5 And, so, we're still considering geography -- you're
6 correct in that -- except the way we're considering it is on
7 a risk bases where every distribution center we assign a
8 risk score and then we adjust the parameters for the highest
9 risk drugs according to that ranking.

10 So to put it in a little more simple terms, I hope, a
11 pharmacy in West Virginia that's serviced by Ohio, the risk
12 ranking we now have -- the geographic risk ranking is a 2 or
13 medium, which means that the, the parameters that are set
14 for pharmacies across the country would actually be reduced
15 by 10 percent for West Virginia pharmacies.

16 And, again, the reason there is, as I've discussed
17 before, is we want to focus the electronic system more
18 closely at where we have perceived increased risk.

19 **Q.** So I thought I was going to get off easy because
20 there's 27 times 10 which was 270.

21 **A.** Two years ago that exactly was the case.

22 **Q.** So how many are there today then?

23 **A.** We don't even consider a peer group number.

24 **Q.** Thank you. And how long did the process take for you
25 to design, test, and roll out this newer version of the

1 Order Monitoring Program after you joined?

2 **A.** So in March of '14, from that period I believe we
3 started rolling out the new or enhanced Order Monitoring
4 Program around mid 2015. And it was a rolling schedule
5 where we would roll it out to certain distribution centers
6 on schedule versus rolling it out completely. We finished
7 that process by the end of 2015, early 2016.

8 **Q.** Thank you. And while we're going to go through some --
9 we've gone through some of those changes to the Order
10 Monitoring Program and the Diversion Control Program, is the
11 basing structure of the OMP today the same as it was in 2007
12 in the sense of flagged orders, then reviewed by a human
13 being?

14 **A.** When it comes to that mechanism that, you know, flagged
15 orders are electronic, then reviewed by humans, that, that
16 has not changed. That's remained.

17 **Q.** And you talk about peer grouping. Are orders that come
18 in from customers also tested against that customer's own
19 prior orders for that same type of product?

20 **A.** Yes. There's two tests that are performed without
21 parameters. There's an individual order test. And what
22 happens there is the customer's order that's placed by the
23 customer for that particular family is measured against that
24 customer's previous 12-month ordering of that particular
25 product family.

1 And, and if the order exceeds that parameter, that
2 would be, that would be a description of what an individual
3 order parameter looks like.

4 **Q.** And the other parameter is the peer grouping one?

5 **A.** The other, the other parameter is peer grouping. And
6 we refer to that as a cumulative volume parameter where what
7 we're doing there is we're measuring the customer's ordering
8 of a product family over rolling 30 days compared to his
9 peers.

10 So the notion there is we look at customer. We say,
11 you know, in terms of his ordering, okay, here's how you've
12 ordered in the past, Customer X, and we want to compare
13 those orders. But we also want to compare your orders to
14 your peer group to see that, that there is alignment or not
15 with those sorts of orders.

16 **Q.** And did you ever ask DEA to take a look at this revised
17 Order Monitoring Program?

18 **A.** I made a request to meet with DEA to, among other
19 things, outline our Order Monitoring Program due to all of
20 the changes what we had made to it.

21 MS. MCCLURE: If you could hand out AM-WV-00640.

22 Your Honor, may I approach?

23 THE COURT: Yes.

24 BY MS. MCCLURE:

25 **Q.** Mr. May, do you recognize this document?

1 **A.** I do.

2 **Q.** And what is it?

3 **A.** This is the letter that I composed to Mr. John Martin
4 requesting a meeting with Diversion Control at DEA.

5 **Q.** Okay.

6 Ritchie, if we could publish that AM-WV-640 up on the
7 screen.

8 And if you could turn, David, to the third paragraph
9 and read that paragraph aloud.

10 **A.** "Since at least the 1980s, ABDC and its predecessors
11 have had systems in place to identify and report suspicious
12 orders of controlled substances to the appropriate
13 governmental agencies in compliance with federal and state
14 law. ABDC's OMP has continually evolved over the years
15 based on input from various stakeholders, especially DEA."

16 **Q.** Okay. And then the next paragraph, does this generally
17 describe the history of the program as you understood that
18 history based on your review when you joined the company?

19 **A.** Yes, it does.

20 **Q.** And then turning to Page 2, the paragraph, "It is --
21 sorry -- "It is as part of this legacy," what are you
22 generally asking for here, David?

23 **A.** Asking for a meeting. You know, we had put a lot of
24 work into our program and we wanted to have an opportunity
25 to sit down with DEA and talk about those changes that we

1 made, and also to see if there was any opportunity where we
2 could better, I guess, serve the regulator in terms of what
3 they wanted us to look at.

4 You know, there may be information that we have that,
5 that -- I'm sorry -- that we don't have that the regulator
6 has. And, and I just thought this would be an opportunity
7 to have that sort of sit-down communication.

8 **Q.** Okay.

9 And if we could do the next paragraph, Ritchie.

10 So this letter is dated in 2018; right?

11 **A.** Yes.

12 **Q.** Why wait until 2018 to ask for this meeting with DEA if
13 the changes were implemented in large part by the end of
14 2015?

15 **A.** So, so they were rolled out by the end of 2015, and the
16 first full year of operation was 2016.

17 One of the learnings that I have is despite all of the
18 testing that we do with the program, it takes some time.
19 And I explained the situation today how there's a business
20 occurrence when I used the Walgreens examples.

21 I have other examples where things happen and really it
22 was about a two-year learning where we were pretty
23 comfortable in terms of those learnings, making the
24 adjustments that we needed to make.

25 And, and also I believe it was in 2017 DEA first

1 started talking about the notion of addressing the
2 suspicious order regulation in, in proposing a new rule.
3 That was in 2017. It didn't occur until, as we've talked
4 about already here today, I believe November of '20 is when
5 that proposal came out.

6 So it just seemed that the timing here was appropriate.
7 We had enough time for the program under our belt. We knew
8 this, this proposed rule was supposed to come out immanently
9 and thought this was the best time to do it.

10 **Q.** Okay. So did DEA respond to this letter as you recall?

11 **A.** I had several email exchanges with DEA after I wrote
12 the letter, yes.

13 **Q.** So did you have a meeting?

14 **A.** I did not. They initially agreed to a meeting, set
15 some, set some potential dates for that meeting, and then
16 they cancelled that meeting.

17 **Q.** Okay, all right.

18 Ritchie, we can take -- I'm sorry.

19 Your Honor, I move for the admission of AM-WV-000640.

20 THE COURT: Is there any admission to -- any
21 objection to 640?

22 MR. PIFKO: No objection on that one.

23 THE COURT: All right. It's admitted.

24 BY MS. MCCLURE:

25 **Q.** So, okay, turning back to our Diversion Control

1 Program Over Time, Mr. May, did the type of data used
2 today that we've displayed in the dashboard differ
3 substantially from the type of data AmerisourceBergen
4 was using in 2014 for on-going customer due diligence?

5 **A.** No. The data is our transactional data. That's what
6 was being used in 2014, and that's what's being used in
7 2021.

8 **Q.** And based on your examination that you talked about
9 when you joined the company and the investigation you did
10 into what had been happening with the Diversion Control
11 Program prior to you joining, is it your understanding that,
12 in fact, this same type of data had been being used for
13 on-going customer due diligence since 2007?

14 **A.** The same type, similar data was being used by
15 AmerisourceBergen at that time. It was just being published
16 in a different format, similar, not exactly the same, but
17 similar data.

18 **Q.** Okay. Mr. May, do you know what an OMP size report is?

19 **A.** Yes.

20 **Q.** What is that?

21 **A.** That is one of these data files or spreadsheets that
22 was produced -- was being produced when I arrived and for
23 years before my arrival at AmerisourceBergen. And it is a
24 spreadsheet that contains our complete list of customers who
25 are purchasing controlled substances. And it works, again,

1 for the DEA registration level.

2 And on the spreadsheet there are certain data points
3 that we track that are relevant to our review. We, in fact,
4 still -- that's the only legacy report we still publish to
5 this day.

6 **Q.** Okay.

7 MS. MCCLURE: If we could pass out AM-WV-406.

8 Your Honor, this is a fairly lengthy, voluminous
9 report. So we've talked with the plaintiffs about doing
10 four copies of the voluminous reports, one going to the
11 witness, two going to the Court, one to opposing counsel.

12 May I approach?

13 THE COURT: Yes.

14 BY MS. MCCLURE:

15 **Q.** Mr. May, what is this document?

16 **A.** May I just have one brief moment?

17 **Q.** Oh, yes. I'm sorry.

18 (Pause)

19 **A.** So this is an OMP size report. It's a little hard to
20 see on the very first line, but it looks like it's dated to
21 the 2014 era from October. It looks like it covers October
22 through, through December sales.

23 **Q.** So this would have been a report run during the time
24 that you were at the company?

25 **A.** Yes.

1 **Q.** And how does the Diversion Control Team use this
2 report?

3 **A.** Again, there are certain data points in here that are
4 relative to that review. And, specifically, you know,
5 looking at Number 1, the trending, what the sales looked
6 like over a period of time, and also particular attention
7 here to the controlled substance percentage ordering by that
8 customer.

9 And, again, this is the 2014 version. There is a 2021
10 version that's quite, quite different.

11 **Q.** But it's -- the 2021 version contains some of the same
12 type of information that's on this 2014 one that we have
13 displayed here?

14 **A.** Yes.

15 **Q.** Okay. And do you have any understanding as to how long
16 prior to you joining the company in 2014 these OMP size
17 reports have been being generated and relied upon by the
18 Diversion Control Team?

19 **A.** I believe I've seen reports -- this particular report
20 going back certainly before 2014. But was it as far back as
21 2009, 2010? I just -- I'm not precisely sure. But it's
22 about that time period.

23 **Q.** So approximately 2009-2010 from your recollection?

24 **A.** From my recollection.

25 **Q.** Okay.

1 MS. MCCLURE: Your Honor, I move for the admission
2 of AM-WV-00406.

3 MR. PIFKO: Your Honor, we don't object to the
4 extent that this format of data was something that they
5 looked at and analyzed. But to the extent they're trying to
6 rely on the exact numbers, this witness doesn't have
7 foundation to authenticate the accuracy of every single menu
8 in that chart.

9 MS. MCCLURE: Your Honor, we are simply submitting
10 this document as evidence of how the program has evolved and
11 the types of data and information the Diversion Control Team
12 was relying on prior to Mr. May's arrival and during the
13 first year and a half when he was at AmerisourceBergen
14 during which the 2007 program was being operated.

15 I'm not asking Mr. May to validate any of the internal
16 documents or numbers in here. It's being offered for
17 purposes of explaining to the Court what that prior time
18 period's on-going customer due diligence looked like.

19 THE COURT: Well, I'm not sure I understand your
20 objection, Mr. Pifko.

21 MR. PIFKO: With Ms. McClure's clarification about
22 the purpose of why they're seeking to admit it, we don't
23 have an objection to that purpose.

24 THE COURT: Well, can you get around the hearsay
25 rule here?

1 MS. MCCLURE: Well, Your Honor, this is actually
2 also a business record in the sense that -- let me lay the
3 foundation for that.

4 BY MS. MCCLURE:

5 Q. Mr. May, are these documents kept and maintained in
6 the course of AmerisourceBergen's doing business on a
7 routine regular basis?

8 A. Yes. So, so this -- the data contained in this report
9 is based upon transactional data by the company that the
10 company keeps as part of its normal operations and business
11 records.

12 Q. So is this an Excel spreadsheet?

13 A. This is.

14 Q. It happens to be in hard copy form as we're looking at
15 it today. But you understand it's maintained in Excel;
16 correct?

17 A. Correct.

18 Q. And the source of that Excel, to your understanding, is
19 the SAP data?

20 A. It would have been an SAP output, yes.

21 Q. And SAP is what?

22 A. SAP is the platform that we utilized at that period of
23 time in 2014 and up to this date. It's essentially the
24 platform through which we manage all of our transactions. I
25 believe they call it an ERP, an Enterprise Risk Platform.

1 That's the technical term for it.

2 MS. MCCLURE: So, Your Honor, with that
3 clarification, I believe that this document can come into
4 evidence for the purpose of explaining what the
5 AmerisourceBergen Diversion Control System on-going order --
6 I'm sorry -- on-going customer due diligence was at that
7 time.

8 THE COURT: Are the entries in this made at or
9 near the time the events purport to portray?

10 THE WITNESS: Yes, they are.

11 THE COURT: Are they made by a person with the
12 duty to accurately make the entries?

13 THE WITNESS: They are.

14 THE COURT: It's admitted.

15 MS. MCCLURE: Thank you, Your Honor.

16 BY MS. MCCLURE:

17 **Q.** When you joined AmerisourceBergen in 2014, was it
18 also using reports for specific types of controlled
19 substances like hydrocodone or oxycodone called trend
20 reports?

21 **A.** Yes.

22 MS. MCCLURE: If we could hand out document
23 AM-WV-00398.

24 And this is similar, Your Honor, a voluminous document.
25 So we have one for the witness, two for the Court, and one

1 for opposing counsel.

2 This is offered for the same purpose as the last report
3 was, both as a business record and not as evidence of what
4 the company was doing when Mr. May joined.

5 May I approach?

6 THE COURT: Yes.

7 BY MS. MCCLURE:

8 **Q.** I did make them two-sided, but they're still
9 voluminous.

10 Mr. May, what is this document?

11 **A.** May I have one minute?

12 **Q.** Yes. I'm sorry. I keep doing that. Apologies.

13 (Pause)

14 **A.** So this would be an example of a sample report of a, of
15 a drug trending report. The period of time here outlined on
16 the report is from June of 2014 through November of 2014.
17 And it shows month over monthly purchasing per registrant of
18 select controlled substances. It also gives you the average
19 month, and then the total for that -- I guess it would be a
20 five-month period.

21 **Q.** And is this document a trend report -- this is for
22 hydrocodone; correct?

23 **A.** So this is not -- appears to be -- at least on my copy
24 I don't see the column for hydrocodone. It's definitely a
25 drug trending report. I just don't see the entry for which

1 drug.

2 **Q.** Okay. We'll come back to that. Have the Tableau files
3 that we've walked through today replaced that report?

4 **A.** Yes.

5 **Q.** Meaning the product trend report?

6 **A.** Yes, they have.

7 **Q.** And based on your review when you joined the company in
8 2014, did you have an understanding that these product trend
9 reports were already being run at the time that you joined?

10 **A.** They were being run at the time -- had already being
11 run at the time that I joined, yes.

12 **Q.** And was that for a similar period, as you understood it
13 for the OMP size report dating from the 2009-2010 time
14 period?

15 **A.** That's the approximate time period based on my
16 recollection of seeing these reports historically.

17 **Q.** Okay.

18 MS. MCCLURE: Your Honor, I move for the admission
19 of AM-WV-00398.

20 THE COURT: Any objection to 398, Mr. Pifko?

21 MR. PIFKO: No objection.

22 THE COURT: It's admitted.

23 BY MS. MCCLURE:

24 **Q.** Now, we're still in on-going customer due
25 diligence. We're in the time period when you joined the

1 company in 2014. We heard a little bit earlier last
2 week about McCloud Family Pharmacy. Do you recognize
3 McCloud Family Pharmacy as being an AmerisourceBergen
4 customer?

5 **A.** I do.

6 **Q.** Do you know if AmerisourceBergen had stopped servicing
7 McCloud at some point prior to today?

8 **A.** Yes.

9 **Q.** Do you know when that was?

10 **A.** I believe it was sometime ago.

11 **Q.** Okay. Did AmerisourceBergen also have OMP weekly
12 dashboards for McCloud in 2015 once the dashboards started
13 being rolled out?

14 **A.** We would have had dashboards at that time period.
15 That's when we started producing the dashboards as we
16 developed the program.

17 **Q.** Okay. If we could hand out AM-WV-0104-E. This is an
18 excerpt for the McCloud and Drug Emporium dashboards.

19 Your Honor, may I approach?

20 THE COURT: Yes.

21 BY MS. MCCLURE:

22 **Q.** Mr. May, the first page of this document is Drug
23 Emporium; correct?

24 **A.** It's reflected the customer name is Drug Emporium, yes,
25 with a DEA registration.

1 **Q.** Okay. And then if we go to the fourth page in, that is
2 reflected as McCloud; correct? And apologies for this being
3 two-sided.

4 **A.** Yes, that is McCloud Family Pharmacy.

5 **Q.** Okay. So are these weekly customer dashboards for both
6 McCloud and Drug Emporium contained within the same
7 document?

8 **A.** Yes.

9 **Q.** And, so, we've earlier walked through the 2018 St.
10 Mary's Medical Center Hospital pharmacy dashboard. But
11 these are independent retail pharmacy customers at this time
12 in 2015; right?

13 **A.** That's correct.

14 **Q.** And does this contain the similar -- even though this
15 is dated in 2015, similar to the dashboards that we
16 previously reviewed for the weeklies for St. Mary's Medical
17 Center?

18 **A.** Yes. The dashboards are produced and do not consider
19 DEA registration type. So it's always the same except for
20 the fact, as you've pointed out, these were the earliest
21 iteration of the dashboard. So they might not be precisely
22 aligned if you compare the '18 to the '15.

23 **Q.** Okay.

24 **A.** But, generally, the content is the same.

25 MS. MCCLURE: Your Honor, I move for the admission

1 of AM-WV-1040-E which are the customer dashboards for
2 McCloud and Drug Emporium. And I do so requesting
3 conditional admission similar to the dashboards that we
4 previously discussed with respect to St. Mary's Medical
5 Center that would be included in a brief that we would
6 submit.

7 THE COURT: You don't want this one displayed
8 outside the courtroom. Correct?

9 MS. MCCLURE: Correct. So I'm not calling it up
10 on the screen and I'm just moving the admission
11 conditionally.

12 THE COURT: All right. Mr. Pifko.

13 MR. PIFKO: No objection to the admission.

14 THE COURT: All right. It's admitted.

15 BY MS. MCCLURE:

16 **Q.** Okay. Mr. May, I believe that you've already
17 touched on these two areas over time. But you -- do you
18 have an understanding that AmerisourceBergen had -- the
19 Diversion Control Team had policies and procedures in
20 place when you joined the company in 2014?

21 **A.** Yes, they did.

22 **Q.** And had that been the case, based on your review of the
23 documents and evidence when you joined, for a substantial
24 period of time prior to your joinder?

25 **A.** Yes, it was.

1 Q. Okay. And training -- you've talked about some
2 training that you have already -- you have conducted. Did
3 you have an understanding that training was something taking
4 place at AmerisourceBergen at the time you joined?

5 A. Yes.

6 Q. Did you have an understanding that the training was
7 something that was happening for a substantial period of
8 time prior to your joining the company?

9 A. That was my understanding.

10 Q. Okay. Let's talk about diversion team resources. When
11 you joined the company out of DEA after 30 years of
12 experience as a special agent, what was your impression of
13 the Diversion Control Team that you joined in 2014 at
14 AmerisourceBergen?

15 A. Could you be a little more precise in "impression"?

16 Q. Of the people, the individuals who were operating this
17 program and running it when you joined.

18 A. Sure. Thank you. So, generally speaking, the members
19 of CSRA and the members of the Diversion Control Team I
20 thought were experienced. I think that they cared deeply
21 about what they were doing.

22 You know, looking back and whether it's, you know,
23 Mr. Zimmerman who's running the program or Mr. Hazewski who
24 was serving as the Director, they were very committed to
25 carrying out the program.

1 The investigators that worked for Mr. Hazewski at that
2 time and later I had personally met with. And, and
3 Elizabeth Garcia was a former DEA diversion investigator who
4 was very conscientious about her work. Eric Martin also was
5 a lifetime employee of AB who, who came over to Diversion
6 Control and was very conscientious. Kevin Kreutzer same
7 situation. So I thought good people, good background.

8 I think I explained on Friday Mr. Hazewski was a career
9 police officer who's a detective. He was a polygrapher.
10 And, so, you know, he had a great reputation.

11 And just generally speaking, I thought good people
12 doing a good job.

13 **Q.** And what Human Resources did the Diversion Control Team
14 have when you started? What, what kinds of resources and
15 where?

16 **A.** So, of course, we had the nucleus of the Diversion
17 Control Team which was Mr. Hazewski and the investigators
18 that worked directly for him. But we also had other groups
19 that we coordinated closely with in terms of carrying out
20 the Diversion Control efforts.

21 So I think I spoke on Friday about Mr. Gundy who was at
22 the company when we started. He had investigators and he
23 would assist with the loss investigations. And, of course,
24 you know, that's an area where we have to make sure that
25 we're not incurring losses at our distribution centers of

1 controlled substances.

2 We also had compliance teams at each and every
3 distribution center that reported up through Mr. Mays. And,
4 however, some of those folks carried out Diversion Control
5 activities.

6 We had a particular personnel designation of RPIC,
7 which was Responsible Person In Charge, who for a period of
8 time assisted and they were located in every distribution
9 center. They assisted with the Order Monitoring Program and
10 execution of the Order Monitoring Program at the
11 distribution center level.

12 **Q.** When you joined in 2014 did you feel the Diversion
13 Control Team had sufficient resources?

14 **A.** I did.

15 **Q.** Today do you feel like the Diversion Control Team has
16 sufficient resources?

17 **A.** I do.

18 **Q.** Are there more or less than seven years ago when you
19 joined?

20 **A.** There are more.

21 **Q.** Today Diversion Control Team, you mentioned that Liz
22 Garcia had been a former DEA diversion. Are there any other
23 former DEA personnel other than yourself who are currently
24 working on the Diversion Control Team today?

25 **A.** Yes. We have several DEA folks that work with me

1 today.

2 **Q.** Mr. May, can you list who they are?

3 **A.** Jeff Kallal, Duane Stickles, Jim Mara (phonetic). And
4 we just hired a former diversion investigator, Cynthia
5 Chiles (phonetic), who is brand new in the past couple of
6 weeks.

7 We also have two pharmacists, one of whom was a former
8 State of Connecticut investigator for several years before
9 she joined H.D. Smith and now AmerisourceBergen.

10 So we have four or five that are former law enforcement
11 on the staff now.

12 **Q.** Does anyone other than you have oversight and
13 responsibility for that Diversion Control Team?

14 **A.** So I share my responsibility now with the directors.
15 So I have different directors over different functional
16 areas that help me manage the program.

17 **Q.** Mr. May, we've heard a lot about the term CSRA. Is
18 CSRA -- would it be fair to say that CSRA is an umbrella
19 that includes the Diversion Control Program but is a broader
20 organization than just Diversion Control?

21 **A.** That would be an accurate description.

22 **Q.** Other than the internal Diversion Control resources,
23 does AmerisourceBergen also have outside consultants that
24 assist with Diversion Control efforts?

25 **A.** Yeah, we have three major consulting services or

1 partners, outside contractors. Of course, I've mentioned
2 several times FTI who have been with us since 2014.

3 We also utilize the Pharma Compliance Group made up of
4 primarily DEA diversion investigators and agents and have
5 been engaged with them -- or that engagement has been
6 precedently at AmerisourceBergen. And we also utilize a
7 company called Pro Compliance who helps us when we're
8 collecting specific data from the pharmacy.

9 **Q.** Do you use any former DEA outside consultants to
10 conduct audits of AmerisourceBergen's Diversion Control
11 Program?

12 **A.** We have used outside former DEA folks. When I joined
13 the company, the company had already engaged with Mike
14 Mapes, and he had been performing those audits for a couple
15 of years.

16 After Mike Mapes left the company to pursue another
17 opportunity -- I believe that was in the year after I
18 arrived, 2015 -- we then hired Mr. Brian Reise who is also
19 former DEA diversion to do some of that work. He also has
20 moved on to another opportunity.

21 **Q.** Could we hand out AM-WV-02763.

22 Your Honor, may I approach?

23 THE COURT: Yes.

24 BY MS. MCCLURE:

25 **Q.** Let me know when you've had a minute to look at

1 that, Mr. May.

2 (Pause)

3 **A.** Okay. I've reviewed that.

4 **Q.** What is this document?

5 **A.** This is a memorandum prepared by Mike Mapes and
6 delivered to Amerisource -- several different members of
7 AmerisourceBergen.

8 **Q.** And what does this document reflect?

9 **A.** It reflects a review of the ABC Order Monitoring
10 Program. And I believe there were some areas that were
11 reviewed in terms of due diligence as well.

12 **Q.** Okay. If you could blow up the part on Page 1 that
13 starts after "Background," if you could display this
14 document, the part after "Background," after "Background,"
15 the next section, Ritchie. Thank you.

16 Can you read the sentence that begins, "The ABC OMP."
17 It's the second sentence in that section.

18 **A.** "The ABC OMP is well managed and appears to be very
19 effective at mitigating the risks associated with the
20 distribution of controlled substances by ABC."

21 **Q.** And is that your understanding of what Mr. Mapes'
22 finding was in this letter?

23 **A.** Yes.

24 **Q.** Okay.

25 MS. MCCLURE: Your Honor, I move the admission of

1 AM-WV-2763.

2 THE COURT: Any objection to 2763?

3 MR. PIFKO: No objection, Your Honor.

4 THE COURT: It's admitted.

5 BY MS. MCCLURE:

6 Q. Okay. David -- you can set that aside, Mr. May.

7 On Friday you discussed sometimes that we --

8 THE COURT: Is this a good place to stop? I've
9 got a sentencing at noon and we'll have to give counsel time
10 to get set up at the table.

11 We'll come back at 2:00, Mr. May.

12 THE WITNESS: Yes, sir.

13 (Recess taken at 11:55 a.m.)

14 THE COURT: Ms. McClure.

15 MS. MCCLURE: Your Honor, during the morning, I
16 marked a document and I asked Mr. May if it contained a
17 report for hydrocodone. It was document number AMWV-00398.

18 THE COURT: Okay.

19 MS. MCCLURE: I pulled the metadata associated
20 with the document and confirmed with Mr. Pifko that the file
21 name for the document is hydrocodoneJune2014_November2014.
22 So, I just wanted to note for the record what the title of
23 that document was.

24 THE COURT: Okay.

25 MR. PIFKO: We don't dispute that either.

1 BY MS. MCCLURE:

2 Q. Okay. Good afternoon, Mr. May.

3 A. Good afternoon.

4 Q. FTI, let's talk about FTI for a minute. You were shown
5 the FTI CSRA Process Report on direct on Friday; do you
6 recall that?

7 A. I do recall, yes.

8 Q. Now, I don't believe you were asked any questions about
9 the findings in that report, but I want to ask you a few
10 things about that report. Can you pull out Plaintiffs'
11 Exhibit 93, which was shown to you on Friday, which you
12 should still have in the set of documents before you?

13 A. Yes.

14 Q. Do you have that document?

15 A. I have that in front of me, yes.

16 Q. Okay. Did you review that report when you received in
17 2014?

18 A. I did.

19 Q. Do you agree with all of the findings in that report?

20 A. No.

21 Q. So, you disagree with some of them?

22 A. Yes.

23 Q. Was there a finding about Diversion Control resources
24 on Page 9 of that document?

25 A. So, if you want to point me to a particular -- that

1 might save us some time in particular.

2 **Q.** I believe it's on Page 9 and it begins with the phrase,
3 "CSRA is very reactive to situations." Do you see that?

4 **A.** Yes, I see it. Thank you.

5 **Q.** Okay. Can you generally, for the record, summarize
6 what you believe that finding to be and advise whether you
7 agree with it or not?

8 **A.** In terms of constantly putting out fires, that that
9 description would mean to me that there was not a lot of
10 planning with our work, that we were more reactionary to our
11 work, and in terms of that, identifying CSRA as the entity,
12 I will tell you from my perspective in Diversion Control
13 everything that we were doing was pro-active. I mean, we
14 managed our work day to day, but this was during a period of
15 time when we were completely reviewing how we were doing
16 things. So, I would not -- I would not agree with that
17 description of the work.

18 **Q.** Were you involved with responding to FTI's findings in
19 a written document?

20 **A.** I was.

21 **Q.** Okay.

22 MS. MCCLURE: can we hand out W -- no, I'm sorry.
23 Can we hand out P-00472?

24 May I approach, Your Honor?

25 THE COURT: Yes.

1 THE WITNESS: Thank you.

2 BY MS. MCCLURE:

3 Q. And let me know when you've taken a moment to look
4 through that document.

5 A. Thank you.

6 Q. And is this a copy of the company, including your own
7 responses, to FDI's recommendations from the report that the
8 plaintiffs had entered at Exhibit 93?

9 A. Yes.

10 Q. And you were not shown this document on Friday,
11 correct?

12 A. That is correct.

13 Q. And if you could turn to Page 2 of the matrix itself,
14 and if you could read the finding on Page 2, which begins,
15 "There is currently"?

16 A. "There is currently a lack of visibility to the process
17 and rationale for adjudicating orders held for review.
18 While both the corporate and distribution center personnel
19 reviewing orders provide comments, there is no standard or
20 defined reasons -- no standard set of defined reasons to
21 support those decisions."

22 Q. And do you agree with that finding?

23 A. I think at the time when I walked through the doors, as
24 I have explained, and with my meetings with DEA Louisville,
25 I was interested at least in terms of providing

1 documentation around the decisionmaking process. I thought
2 that there was -- there was room for improvement on that
3 area.

4 I don't -- I did not agree with the lack of -- the lack
5 of visibility conclusion that was made in terms of -- in
6 terms of the process when adjudicating orders. So, a little
7 bit of both there.

8 **Q.** Okay. Did you take the FTI Process Report and
9 responding to it seriously?

10 **A.** I did.

11 **Q.** But you don't agree with each and every conclusion that
12 they reached; is that fair?

13 **A.** That's fair. This is -- this report was generated
14 after what FTI has actually described in their own document
15 as somewhat of a brief review and I believe they interviewed
16 possibly 20 associates during the time of the review. We
17 had already been engaged at this time and had a
18 several-month review of our processes, so I felt like our
19 process was much more comprehensive in terms of our -- our
20 assessment of our own programs.

21 **Q.** So, when you say "our" in that sentence, is that the
22 Diversion Control Team and FTI's separate process about
23 revising the program?

24 **A.** Correct. And there's reference in the first document
25 where FTI also indicates that they were engaged with us

1 separately and so, therefore, did not -- did not expend a
2 lot of their time in our area.

3 **Q.** Okay, thank you.

4 **A.** Versus other CSRA areas.

5 **Q.** Okay, thank you.

6 MS. MCCLURE: Your Honor, I seek admission of
7 P-00472.

8 THE COURT: Is there any objection?

9 MR. PIFKO: No objection.

10 THE COURT: Admitted.

11 **DEFENSE EXHIBIT P-00472 ADMITTED**

12 MS. MCCLURE: Okay. You can set that aside, Mr.
13 May.

14 BY MS. MCCLURE:

15 **Q.** Turning to ARCOS data, what entity houses ARCOS data?

16 **A.** DEA.

17 **Q.** Historically, say when you joined the company in 2014,
18 did AmerisourceBergen or any other distributor, to your
19 knowledge, have access to ARCOS data at all?

20 **A.** In terms of understanding our customers and the ability
21 to understand whether a customer had more than one supplier,
22 the answer would be no. There have been six-month ARCOS
23 reports produced publicly by DEA for sometime, but they are
24 not customer-specific, nor are they distributor-specific, so
25 they don't really offer any information for us that's of any

1 utility.

2 **Q.** So, those six-month reports are aggregated data?

3 **A.** Aggregated nationwide data that reflects just total
4 distribution across the country.

5 **Q.** Okay. On direct on Friday, you testified about
6 sometimes thinking that AmerisourceBergen could know if
7 other distributors were servicing a customer who is applying
8 to us to become one of our customers. If we didn't have
9 access to ARCOS data, how would we have known that?

10 **A.** The only way to know -- well, I'm not sure that you
11 could absolutely know it. You can ask the question of the
12 customer and then you would be -- you know, assume the
13 customer tells the truth. That's the only way to know that.

14 **Q.** And is that a portion that's on AmerisourceBergen's 590
15 Form, the questionnaire where customers sign up to become a
16 customer of AmerisourceBergen?

17 **A.** Yes.

18 **Q.** Whether you're being serviced by another distributor
19 currently?

20 **A.** Whether you have another distributor. Not precisely
21 sure of the language, but it's to that effect.

22 **Q.** Okay. Did there come a time where you did have access
23 to more ARCOS data than you had when you joined the company
24 in 2014?

25 **A.** Yes. DEA has developed a tool for wholesale

1 distributors to utilize and which gives us the ability to --
2 for ARCOS reportable drugs. So, Schedule II and Schedule
3 III narcotics for distributors and manufacturers gives us
4 the ability to investigate a customer by registration number
5 and query the system to see if that registrant, customer,
6 pharmacy had more than one distributor. And it would query
7 the most previous six-month period. And through that tool,
8 you could then see if there was more than one distributor
9 and the total dosing units for whatever ARCOS reportable
10 drug you had a query for.

11 **Q.** And when was the first time that that tool was made
12 available to you?

13 **A.** I believe that the tool was developed, at least in
14 part, out of the Support Act, which I -- I believe the
15 requirement was that DEA develop that capability by 2018, at
16 some point in 2018, if my recollection serves me.

17 So, they develop the tool and then they've made a
18 couple of improvements on it since developing it.

19 **Q.** Did the tool first tell you how many other wholesalers
20 a customer would have and then later, it eventually added
21 the amount of certain controlled substances that were being
22 supplied by the other distributor?

23 **A.** My understanding is, when it first came out, it would
24 let us query. It would list how many distributors there
25 were for a particular reportable drug and it would list the

1 dosing units under that, each distributor. I think the
2 improvement that was made is that it gave us the ability to
3 perform a multi-drug family query. At least, that was one
4 of the improvements.

5 And, again, so instead of putting in hydrocodone for a
6 particular customer, you could list ten different reportable
7 drugs and have all of those listed in the response. I
8 believe that was the improvement.

9 **Q.** Okay. And despite the fact that we did not have --
10 AmerisourceBergen did not have access to that tool prior to
11 2018, we have reported transactional DEA to the ARCOS system
12 if it's an ARCOS reportable drug since when?

13 **A.** Since their requirement has been established.

14 **Q.** Okay. And are you also aware of whether we report any
15 other data to DEA about our transactions?

16 **A.** We report each and every controlled substance sale that
17 we make to our customer base and have been doing so since
18 2007 to DEA. It's a separate reporting not required by the
19 regulation, but it was required by the agreement that we
20 entered into with DEA in 2007.

21 **Q.** Is it fair to say that DEA has known every single
22 controlled substance AmerisourceBergen has shipped to any of
23 its customers within two days after the shipment was made
24 since 2007?

25 **A.** That is the reporting that's occurred since 2007.

1 **Q.** Okay. Mr. May, moving on to a newer area, what is a Do
2 Not Ship List?

3 **A.** Do Not Ship List is a tool that we've utilized in the
4 Diversion Control Program. I referred to it as a tool.
5 It's essentially a list of customers that we have maintained
6 over the years, pre-dated me in 2014, and I believe it goes
7 back as far as 2007, 2006, if I recall correctly, and
8 essentially it is a list of DEA registrants that we have
9 either terminated the sale of controlled substances and
10 listed chemicals or completely terminated the relationship
11 with those customers. And I have been maintaining that
12 tool, like I said, for sometime, up to and including the
13 present.

14 MS. MCCLURE: Okay. Can we hand out AMWV-00601?

15 Your Honor, may I approach?

16 THE COURT: Yes.

17 BY MS. MCCLURE:

18 **Q.** Have you had a minute to look at that document?

19 **A.** I have, thank you.

20 **Q.** Mr. May, are there actually two separate sections of
21 this document? Unfortunately, because it's an Excel, the
22 pages are not numbered, but I would direct you to the last
23 three pages of the document, which have a different title
24 than the first several.

25 **A.** Yes. Included in the rear of the attachment is a list

1 of -- removed list currently approved for CS purchases,
2 which would indicate to me that this represented those
3 customers that were once on the Do Not Ship List that were
4 subsequently re-evaluated and approved for purchasing of
5 controlled and listed chemicals.

6 **Q.** Okay. Mr. May, is the list that I sent you, which I
7 believe is the Do Not Ship List and then the customers who
8 were previously on it who are now permitted to ship, is this
9 list a nationwide list?

10 **A.** It is nationwide.

11 **Q.** Okay. When a customer is added to this Do Not Ship
12 List, do you know for a fact that diversion is happening?

13 **A.** No. This is -- again, and I talked about this a little
14 bit on Friday. This is pursuant to our risk assessment
15 where we identify potential red flags. We investigate those
16 red flags and, for one reason or another, we're not able to
17 mitigate those red flags to a satisfactory degree. And so,
18 this is one option that we have, is to add the customer to
19 the Do Not Ship List and stop shipping controls to them.

20 MS. MCCLURE: Okay. Your Honor, I move for the
21 admission of AMWV-00601.

22 THE COURT: Any objection to -- any objection to
23 601?

24 MR. PIFKO: No, Your Honor.

25 THE COURT: It's admitted.

DEFENSE EXHIBIT AMWV-00601

BY MS. MCCLURE:

Q. And, Mr. May, do you and the Diversion Control Team tell DEA when we place a customer on the Do Not Ship List?

A. So, beginning in January of 2018, we changed our procedure to include written notification to the local Field Division where the pharmacy was located, as well as the State Board of Pharmacy for every pharmacy that we add to the Do Not Ship List.

And essentially how the program works is, it's May -- whatever customers would be added in May, in June, we would then write letters to the DEA and Board of Pharmacy where the pharmacies were located informing them of our decision to terminate the sale of controlled substances and listed chemicals.

Q. Okay. Mr. May, after AmerisourceBergen has terminated a customer's ability to purchase controlled substances, have any of those customers raised concerns about the fact that they believe termination will affect patient access to medication?

A. Yes.

Q. And can you describe one of those situations?

A. We had a pharmacy in Alaska named Bernie's Pharmacy and, again, the scenario was we saw some potential red flags at Bernie's Pharmacy. We conducted a pretty comprehensive

1 review, made the determination that we could not mitigate
2 those red flags, and made the decision to terminate the sale
3 of controlled substances and listed chemicals.

4 Following that decision, we informed the pharmacy as we
5 do not only of our initial concerns, and we give them an
6 opportunity to respond to our initial concerns, which they
7 did, and then we subsequently reviewed that, made our final
8 decision that their response did not fully mitigate our
9 concerns. We made the final decision to terminate the sale
10 of controlled substances and the listed chemicals.

11 They then hired an attorney and we were brought to
12 federal court in Alaska and where ultimately the judge found
13 for the pharmacy and ordered us to continue our shipment of
14 controlled substances and listed chemicals to the pharmacy.
15 One of the main concerns from the pharmacy, their
16 perspective, was that they were concerned with patient
17 access issues.

18 **Q.** And in connection with that case, did any other entity
19 or person raise concerns about patient access to medication?

20 **A.** There was an official, a Health Department official in
21 Alaska, who communicated with me on the evening that we
22 finished our court date and he communicated to me directly
23 about that very issue saying he was concerned about patient
24 access and patients not being able to get controls and would
25 I be willing to work with him and his office to make sure

1 that it didn't -- didn't cause any, you know, harm to
2 patients and I -- I agreed that I would but, subsequently,
3 it was out of my hands because the Court ordered us to
4 continue servicing the pharmacy.

5 **Q.** Okay. So, to be clear, the state official, I think you
6 said it was?

7 **A.** Yes.

8 **Q.** The state official who wrote you was asking you to
9 continue servicing that pharmacy or not?

10 MR. PIFKO: Objection, hearsay on the state
11 official's comments.

12 MS. MCCLURE: Your Honor, Mr. May has already
13 testified to the official's comments and the request without
14 objection. Moreover, it goes to effect on the listener and
15 I'm asking Mr. May to clarify his prior testimony.

16 THE COURT: Well, I think this is necessary to
17 complete his story here, so I'm going to allow it.

18 THE WITNESS: My sense was and my understanding
19 was that that health official actually thought that the
20 Court was going to rule in another way and, in fact, the
21 Court ruled against us. His message to me was sent before
22 the Court ruling that I received, the court ruling, and
23 essentially he was trying to prepare for a situation where
24 customers, patients that were being serviced by that
25 pharmacy, would no longer have those medication available to

1 them.

2 **Q.** So, he was asking you to work with them and continue to
3 service Bernie's?

4 **A.** It wasn't that specific. And, again, folks that maybe
5 are utilizing or misusing opioids, having have them not
6 receive their medication could -- could cause danger to
7 their lives and so, I think he was trying to manage through
8 that.

9 **Q.** When AmerisourceBergen makes the decision to terminate
10 a customer's ability to order controlled substances, are you
11 overriding the decision of the DEA, who currently has that
12 pharmacy licensed?

13 **A.** So, to the extent that we're saying to a pharmacy and a
14 pharmacist that even though you're registered with DEA, duly
15 registered, and you're licensed by the State, we're
16 essentially saying to them it doesn't matter. We see this
17 risk and we can't mitigate it. So, even though you possess
18 the necessary licensure, we're not going to supply you. So,
19 to the extent that we're overruling the State and the DEA, I
20 guess I would describe it like that, as opposed to
21 overruling. We're just saying we're not going to do it even
22 though they're licensed appropriately.

23 **Q.** And that would apply also to the trained pharmacist who
24 has a license at that pharmacy?

25 **A.** Correct.

1 **Q.** That would apply also to the trained physician who is
2 the one prescribing the medications where patients are then
3 bringing that prescription to the pharmacy?

4 **A.** Correct. That -- the entire chain is -- I guess I
5 would refer to it as the clinician chain. We're
6 essentially, you know, overriding their -- in some extent --
7 some extent their educational training and background.

8 **Q.** And of those entities in that chain, are we -- does
9 AmerisourceBergen have information about the specific
10 patient for whom those medications may be intended?

11 **A.** No. We don't see -- of course, we don't see the
12 patient/doctor relationship. We don't understand the
13 treatment, the diagnosis that the prescriber puts forth. We
14 don't see the interaction between the pharmacist and the
15 patient in the evaluation that the pharmacist performs in
16 terms of his corresponding responsibility at, you know,
17 adjudicating that prescription in terms of its medical
18 necessity. All of that is beyond our view. We don't see
19 any of those interactions.

20 **Q.** Okay, thank you.

21 Switching to a different topic, you've talked about
22 orders of interest and flagged orders. Those are not
23 suspicious orders; is that correct?

24 **A.** That's correct.

25 **Q.** If a customer goes over their allotted perimeter in the

1 AmerisourceBergen system, is that an order that is required
2 to be reported to DEA?

3 **A.** No.

4 **Q.** Has DEA ever provided definitional guidance in the
5 regulation as to what the word unusual means?

6 **A.** No.

7 **Q.** How about deviating substantially from a normal
8 pattern?

9 **A.** No.

10 MS. MCCLURE: Okay. If we can pass out
11 AMWV-00896.

12 Your Honor, may I approach?

13 THE COURT: Yes.

14 THE WITNESS: Thank you.

15 BY MS. MCCLURE:

16 **Q.** Have you had a moment to look through that document?

17 **A.** Yes, I have. Thank you.

18 **Q.** Okay. What is this document?

19 **A.** This is an e-mail exchange between had and myself.
20 There's others included, but you can't see the complete
21 distribution list. You can see the -- my response at the
22 end where I just thank -- thank had and Ruth Miller for
23 sharing the information.

24 **Q.** And your e-mail is --

25 MR. FARRELL: Objection, Your Honor.

1 THE COURT: Just a minute. What's the basis for
2 the objection?

3 MR. FARRELL: It's me, Mr. Farrell. The basis is
4 that you have precluded me from asking very similar
5 questions on Friday of Mr. Zimmerman regarding had and
6 excluded the evidence.

7 MS. MCCLURE: Your Honor, may I respond?

8 THE COURT: Yes.

9 MS. MCCLURE: Your Honor, this is a -- if you look
10 at the e-mail, it is a summary of a meeting where DEA was
11 present at a meeting and gave DEA -- provided commentary.
12 It is not an had-related meeting. It is not in the vein of
13 the *Noerr-Pennington* objections that the defendants have
14 raised to some of the evidence Mr. Farrell is discussing
15 presenting with Mr. Zimmerman.

16 This document is a summary of DEA's statements. It is
17 being offered for effect on the listener and notice. The
18 fact that it happens to be at a -- at a meeting with had is
19 not the point of the document. It is being offered for the
20 comments recorded in here, which are from DEA at this
21 meeting.

22 THE COURT: Well, it's hearsay, isn't it?

23 MS. MCCLURE: Yes, but it's being offered for
24 notice and the effect on the listener, as well as the state
25 of mind of the speaker. It's not being offered for the

1 truth. It's a summary of a meeting and plaintiffs are free
2 to question Mr. May on the document itself, but it's
3 unrelated to the reasons that the Court declined to permit
4 the admission of various documents Mr. Farrell is
5 referencing regarding had and the *Noerr-Pennington* and First
6 Amendment issues.

7 THE COURT: Mr. Farrell?

8 MR. FARRELL: On Friday, you asked me what does
9 this have to do with flooding pills into West Virginia, and
10 you struck it, and I wasn't even permitted to lay a
11 foundation because of the timing of it. This document is
12 dated August 31, 2017.

13 MS. MCCLURE: Your Honor --

14 THE COURT: Well, I don't remember the document
15 you were offering. What -- what was it?

16 MR. FARRELL: I was -- we had an entire series of
17 had documents, including *The Crisis Playbook*, the *Turning*
18 *the Tide in West Virginia*, discussions of meetings with the
19 DEA. In fact, *The Crisis Playbook* contained a section on
20 how to deal with the DEA. You -- you struck all of the had
21 stuff, not only on *Noerr-Pennington*, but on relevance
22 because you said what does this have to do with your case.

23 So, all I'm suggesting is, is that if they're allowed
24 to get into their meetings in 2017, their understanding of
25 the law, their dealings with their trade group, then we

1 should be allowed to show that there's another side to this
2 coin.

3 MS. MCCLURE: May I respond, Your Honor? Mr.
4 Farrell -- the evidence that Mr. Farrell is talking about
5 had to do with evidence that he believed was demonstrating
6 concerted action of the companies joining together, having
7 this Trade Association, for the purpose of all of the
8 various arguments Mr. Farrell made on Friday.

9 This document is being offered -- the had part of it
10 has literally no bearing on the point. It just happens that
11 the document was summarized by someone who attended the
12 meeting who is from had. The statement that I'm going to
13 particularly be directing Mr. May to is at the bottom of
14 Page 1. It relates to the statement "gray is good" and the
15 suspicious order reporting requirement.

16 It's -- the had involvement here is, at best,
17 incidental. It has no bearing on the document itself, which
18 is being offered for the purpose of a summary of the DEA's
19 statements that are made within it.

20 THE COURT: I've got the transcript here, Mr.
21 Farrell, and I hadn't ruled on that and you withdrew the
22 documents before I ruled on them; correct?

23 MR. FARRELL: That was not my understanding --
24 well, I did withdraw after you -- I did withdraw the
25 documents after you said that you didn't find them

1 compelling at all.

2 THE COURT: Yes, but I didn't rule on it, and I
3 didn't rule them out. I was just telling you -- I guess
4 inviting you to straighten me out if I was wrong. I, mean
5 you withdrew the document. I didn't rule on it.

6 MR. FARRELL: Judge, I did not interpret our
7 colloquy on Friday as an invitation to straighten you out.

8 THE COURT: Well --

9 MR. FARRELL: I took it as a clear indication that
10 you were not interested in hearing any of that evidence.
11 So, with that being said, you know, I'll let the record
12 stand on the entire --

13 THE COURT: Okay. Well, you withdrew the
14 document, so your argument is not making much progress with
15 me here.

16 MR. FARRELL: Yes, Your Honor.

17 THE COURT: Do you agree that it's a -- putting
18 that aside, your unfairness argument, do you agree that it's
19 admissible not -- the hearsay is not admissible, but it's
20 admissible for another purpose?

21 MR. FARRELL: Yes, Your Honor. We believe all of
22 the communications with the had are admissible.

23 THE COURT: Okay, it's admitted. Are you
24 objecting to it?

25 MR. FARRELL: No, we are not.

1 THE COURT: Okay. It's admitted.

2 DEFENSE EXHIBIT AMWV-00896 ADMITTED

3 BY MS. MCCLURE:

4 Q. Mr. May, what is this e-mail from Ms. Miller about?

5 A. It summarized a meeting between members of had and DEA
6 in August of 2017.

7 MS. MCCLURE: If you could go to the bottom,
8 Richie, of the document and blow up the section that's "gray
9 is good".

10 BY MS. MCCLURE:

11 Q. Can you read that paragraph into the record, Mr. May?

12 A. The entire paragraph?

13 Q. Yes, please.

14 A. "Gray is good/accountability. We gained a little
15 insight into Mr. Lewis's perspectives about how regulations
16 should be written. While he expressed concern that some of
17 the DEA regulations have remained unchanged since 1971, he
18 also expressed that, based on his experience in the field
19 for DEA, gray is good, meaning that overly defining
20 requirements can create its own problems. Had pointed out
21 that while flexibility is necessary, it also is essential
22 that the agency establish parameters so that registrants can
23 understand when they have strayed outside. Mr. Lewis also
24 expressed his view that the agency should clearly convey
25 each registrant's accountability so that registrants

1 understand and can accept their responsibilities."

2 **Q.** Mr. May, who is Mr. Lewis?

3 **A.** A DEA headquarters personnel that was responsible for
4 the -- at least in part for drafting proposed rules and
5 regulations on behalf of DEA.

6 **Q.** Okay. So, did you view the statement, quote, "gray is
7 good", to be a statement that is helpful as applied to the
8 definition of what is a suspicious order or not?

9 **A.** Not when it comes to suspicious order identification
10 and reporting. It's a -- it's an area of the regulation
11 that DEA has used in the past to take certain action
12 relative to industries -- I guess issues associated with the
13 way industry has reported suspicious orders, whether that
14 action was some sort of administrative, or civil action, or
15 otherwise.

16 And so, in an area where DEA has used this particular
17 -- this particular part of the regulation to consistently --
18 consistently carry out enforcement to the industry, that is
19 one that we would want as much clarity around that portion
20 of the regulation as is possible to make sure that we don't
21 run afoul of what the expectation is by -- by the regulator.

22 I think, to his point, I think there are areas where,
23 you know, with regulations, you don't maybe want a lot of
24 specificity, but when it comes specifically to suspicious
25 order reporting and the consequences of not -- of not doing

1 it to the level that the regulator experts, I think you need
2 all the clarity that you can get.

3 **Q.** Is it your understanding based on your experience in
4 the industry that the determination of whether an order is
5 suspicious or not is subjective?

6 **A.** Yes, it is subjective.

7 **Q.** And is a suspicious order the same thing as an order
8 that is going to be diverted?

9 **A.** I don't know what an order that's going to be diverted
10 -- we don't know if an order is going to be diverted. I
11 know a suspicious order is -- what is -- it is defined as.

12 And, again, we report suspicious orders based upon our
13 understanding of the regulation and how the regulation
14 defines them. In terms of whether an order that we declare
15 suspicious, somehow a portion of that order gets diverted,
16 we have no -- we have no visibility. Once we -- the
17 medications leave our -- leave our possession, we just don't
18 have the visibility.

19 Contrary, there could be an order that we release
20 that's not suspicious and then a portion of that order could
21 ultimately be diverted. We just don't have that level of --
22 level of views to the downstream end use of the product.

23 **Q.** And I just want to confirm one thing based on what
24 you've just said. Does AmerisourceBergen ship any
25 suspicious orders?

1 **A.** We do not.

2 **Q.** Okay. Let's turn to the GAO.

3 MS. MCCLURE: If you could hand out DEFWV-2181.

4 Thank you.

5 And, Your Honor, may I approach?

6 THE COURT: Yes.

7 BY MS. MCCLURE:

8 **Q.** Now, Mr. May, this is a lengthy document. I'm not
9 going to direct your attention to the entire thing, but let
10 me know when you have taken a look at it.

11 **A.** Thank you.

12 **Q.** Okay.

13 MS. MCCLURE: Richie, could you pull that document
14 up on the screen, please?

15 MR. FARRELL: Judge, excuse me.

16 MS. MCCLURE: Yes.

17 MR. FARRELL: Objection.

18 THE COURT: What's the basis of your objection?

19 MR. FARRELL: So, there's a motion in limine filed
20 by the defendants to prevent us from submitting and talking
21 about the House ENC Report and, if I'm not mistaken, this
22 GOA Report is a report to the same panel that published the
23 ENC Report.

24 So, this goes to the same thing with the OIG. You let
25 the OIG Report in. They're now asking for the GOA Report to

1 come in. And we're -- still have pending whether or not the
2 plaintiffs are permitted to introduce and reference the ENC
3 Report.

4 MS. MCCLURE: May I respond?

5 THE COURT: Go ahead, please.

6 MS. MCCLURE: Your Honor, the Energy and Commerce
7 Report is a staff report. It is not a Congressional Report.
8 It is a staff-level report issued, in fact, not by a
9 bipartisan portion of the staff, but only by the majority
10 staff. It is not an official congressional record. That, I
11 believe, has been made clear by our briefing.

12 The reliability concerns, the extent of bias and
13 potential issues that come from a report that is as
14 political as that lower-level staff report, that is not
15 present with respect to GAO, which is the government --
16 United States Government Accountability Office, who is
17 charged with evaluating the efficiency and effectiveness of
18 government programs.

19 It is simply an entirely different analysis from the
20 ENC Report. It is more akin to the OIG Report, the Office
21 of Inspector General, in the sense that it is an audit
22 conducted and none of the reliability concerns that
23 accompany and are the reason for the defendant's motion on
24 the ENC Report are equally applicable here.

25 So, this report is just entirely different in character

1 and understand that, to an outsider, it may appear that
2 these government reports are all the same. They simply are
3 not and that is the reason that we've offered you the case
4 law with respect to the ENC Report not being admissible.

5 THE COURT: Okay. How does this -- how does this
6 come into evidence? Why --

7 MS. MCCLURE: So, this -- additionally, there are
8 several hearsay exceptions that would apply to this
9 document. So, it is, I believe, considered a public record.
10 I'm not looking at my rule book, but I think that's 803(8).

11 Additionally, it is -- it comes in for the purpose of
12 notice. You're going to -- what I intend to elicit from Mr.
13 May is to have portions of the document in which DEA is
14 instructed by OIG to create more --

15 THE COURT: Let me interrupt you. It is a report
16 by a government agency under a duty to investigate and
17 report accurately subject to the report; correct?

18 MS. MCCLURE: Yes, Your Honor, it is. It is an
19 official audit of the GAO.

20 THE COURT: And, Mr. Farrell, doesn't that make it
21 a lot different from the report you wanted to get in, which
22 was a report of the majority of a Committee in Congress
23 without any input even from the minority?

24 MR. FARRELL: I will withhold comment on the
25 majority and minority. I think that would bolster our

1 argument, if anything, but that being said --

2 THE COURT: How does this bolster your argument
3 for one side to be cut out of the process?

4 MR. FARRELL: Well --

5 THE COURT: If it was?

6 MR. FARRELL: Well, because the hearing -- well,
7 I'll let our briefing on ENC stand for itself. The ENC
8 Report is half of what we're talking about here. Half of
9 that report talks about the DEA's role and their missed
10 opportunities with the opioid epidemic.

11 THE COURT: Well, I know, but you're not answering
12 my question. Why -- how is it reliable if it's produced by
13 half of a Congressional Committee after a -- after a
14 hearing? And we've all seen those hearings on TV and how
15 they go.

16 MR. FARRELL: I understand. I think that all of
17 these agencies particularly sometime have agendas and I
18 don't see any distinction between one arm of the federal
19 government publishing a report and the other. You have the
20 opportunity to provide the weight that's appropriate to
21 either one of them.

22 What we take exception to is the admission of one and
23 the exclusion of the other when you can provide whatever
24 weight it is that you want. We think we should be allowed
25 to make hay with whatever that ENC Report says favorable to

1 us, just like we think we should be able to make hay with
2 the favorable aspects of the OIG and GOA Report.

3 It just seems as if the defendants are cherry-picking
4 the documents they want to go in and then cherry-picking the
5 portions to have read aloud within those reports.

6 THE COURT: Well --

7 MS. MCCLURE: Your Honor --

8 THE COURT: I see a big difference between these
9 two documents and I have a big problem with the Majority
10 Committee Report you're referring to and I've got that on my
11 plate to rule on.

12 MR. FARRELL: Judge, we believe it was a
13 bipartisan investigation, but I'll rely --

14 THE COURT: It was a bipartisan investigation that
15 produced a report by one side of the -- of the aisle.

16 MR. FARRELL: Yes, sir. I'll let the smarter
17 lawyers on my team -- rely on their briefing on the matter.

18 MS. MCCLURE: And, Your Honor, I just -- at this
19 point, I don't believe it's the time or the place to argue
20 for the ENC Report. I do defer to my smarter colleagues, as
21 well, in the sense that I'm not the drafter of that or the
22 arguer.

23 Nevertheless, I do think that there is already
24 sufficient evidence and proffer in the record as to why this
25 document is materially different in character than that of

1 the ENC and that whatever the Court immediately does with
2 the ENC Report, this does not affect or control this
3 independent separate report by the Government Accountability
4 Office.

5 THE COURT: And you're saying it comes in under
6 803(8), as a public record?

7 MS. MCCLURE: If I got the number right, Your
8 Honor, then I'm even more impressed with myself, but --

9 THE COURT: (a)(2), a matter observed while under
10 a legal duty to report.

11 MS. MCCLURE: Yes, Your Honor.

12 THE COURT: That's what it is?

13 MS. MCCLURE: Yes, Your Honor.

14 THE COURT: I'm going to admit it. It's admitted.

15 **DEFENSE EXHIBIT DEFWV-2181 ADMITTED**

16 MS. MCCLURE: Thank you.

17 BY MS. MCCLURE:

18 **Q.** Mr. May, have you seen this document before?

19 **A.** I have.

20 **Q.** And what's the title of the document?

21 **A.** "Report to Congressional Requesters. Prescription
22 Drugs. More DEA Information About Registrants' Controlled
23 Substances Roles Could Improve Their Understanding and Help
24 Ensure Access."

25 **Q.** And who is the author of this document?

1 **A.** It's the GAO.

2 **Q.** And what is the GAO?

3 **A.** Government Accountability Office for the Federal
4 Government.

5 **Q.** Okay. And if you could turn several pages into the
6 report, it's Page 3 of the report, the bottom right. Bates
7 number ends in 734.

8 Mr. May, let me ask you, have you reviewed this
9 document before?

10 **A.** I have reviewed this document. I have not read it
11 cover to cover though.

12 **Q.** And have you reviewed it in the course and performance
13 of your job duties at AmerisourceBergen in 2015?

14 **A.** In 2015? Actually, I believe I was -- actually spoke
15 with GAO on the phone, GAO Atlanta, as they were doing the
16 study, if I recall correctly, and then I subsequently
17 reviewed parts of their report.

18 **Q.** Okay. And what did you understand on Page 3 the
19 report's purpose to be or what it examines?

20 **A.** Again, I think one of the focuses of the report, to my
21 recollection, was around -- and this is more of my
22 recollection than just reading here.

23 **Q.** Okay.

24 **A.** Was around the whole notion of assessing the level of
25 communication and collaboration between DEA, the agency, and

1 the registrant community, and I think that was one of the
2 areas that they were looking at.

3 **Q.** Okay. If you could turn to Page 25. And there's a
4 paragraph that basically suggests that some guidance -- or
5 some distributors believe additional guidance would be
6 helpful from DEA regarding what suspicious order reporting
7 is expected. Do you agree with that, that statement as --
8 from your role in the industry?

9 **A.** Yes. And, as I stated during the last series of
10 questions, any additional guidance we can get from the
11 regulator specifically that goes to how we carry out or
12 fulfill our duties to meet the regulation would be
13 beneficial.

14 **Q.** Okay. If you could turn to Page 44 and, in the
15 recommendations section in that -- that middle bullet, could
16 you read that middle bullet out loud that begins, "Solicit"?

17 **A.** "Solicit input from distributors, or associations
18 representing distributors, and develop additional guidance
19 for distributors regarding their roles and responsibilities
20 for suspicious orders monitoring and reporting."

21 **Q.** Okay. Do you agree that DEA providing additional
22 guidance would be beneficial?

23 **A.** Yes.

24 **Q.** Okay.

25 MS. MCCLURE: Your Honor, I'm not sure I actually

1 moved for admission of this document. At this time, I do
2 move for the admission of DEFWV-2181. I think we did that,
3 but just to make sure --

4 THE COURT: I think I admitted it, didn't I?

5 MS. MCCLURE: Yeah, okay.

6 THE COURT: It's admitted.

7 Do you object to it, Mr. Farrell?

8 MR. FARRELL: I'm confused on whether I do or not,
9 Judge, but --

10 THE COURT: Well, that's up to you.

11 MR. FARRELL: I think you already ruled. Let our
12 objection be noted for the record.

13 THE COURT: Well, and the basis of your objection
14 was it's not fair for me to let it in, right?

15 MR. FARRELL: Yes, Your Honor.

16 THE COURT: Okay. Under all the circumstances of
17 the case?

18 MR. FARRELL: Yes, Your Honor.

19 THE COURT: Because the document you withdrew, I
20 didn't rule on?

21 MR. FARRELL: Well, that would be a depiction that
22 reflects poorly on me but, yes, that's the argument I made.

23 THE COURT: How does that reflect poorly on you?

24 MR. FARRELL: Well, the -- the matter is of bigger
25 significance to us than simply the plaintiffs withdrew it.

1 This, as you can appreciate, has been a three-year-running
2 legal dispute between two very capable teams of lawyers.
3 And so, we have very strong opinions as to the admissibility
4 of some of the documents that have been excluded, but I
5 understand your rulings and respect them.

6 THE COURT: Well, if you want me to rule on it,
7 you're going to have to offer it again because you withdrew
8 it.

9 MR. FARRELL: Yes, Your Honor.

10 THE COURT: Okay. Well, if that issue comes up,
11 then I'll go back and re-read the briefs and rule on it.

12 MR. FARRELL: Yes, Your Honor.

13 MS. MCCLURE: Thank you.

14 BY MS. MCCLURE:

15 Q. Mr. May, did DEA issue formal guidance regarding the
16 distributor -- I'm sorry -- regarding the suspicious order
17 definition in 2015 after this report came out from GAO?

18 A. No.

19 Q. How about 2016?

20 A. No.

21 Q. And is it true that it was not until 2020 that they
22 offered that additional guidance?

23 A. Actually, what was offered in 2020 was a proposed rule
24 for public comment. And so, DEA was offering to -- through
25 that proposed rule process is looking to change the language

1 in the implementing regulation and that's what was presented
2 in late 2020.

3 MR. FARRELL: Objection, Your Honor. We object to
4 the characterization of the DEA's intent. The document
5 should speak for itself.

6 THE COURT: Sustained.

7 BY MS. MCCLURE:

8 **Q.** Mr. May, what was your understanding of the proposed
9 rule that was offered in November of 2020 by DEA?

10 **A.** As a registrant and anybody in the public under the,
11 you know, proposed rule process can comment on the proposed
12 rule by DEA. And so, DEA published its proposed rule and
13 looking to seek comments from the public and the focus of
14 the proposed rule was, for the most part, suspicious order
15 reporting.

16 **Q.** And, Mr. May, do you recall if there was yet another
17 GOA Report that came out before DEA offered that notice of
18 the propose rulemaking in 2020?

19 **A.** Yes, there was.

20 **Q.** And do you recall whether that also commented on the
21 fact that the recommendation from 2015 was still outstanding
22 as of 2020?

23 **A.** That's my recollection.

24 **Q.** Okay.

25 **A.** At least in part in the document. That's one of the

1 items.

2 **Q.** Okay. And, Mr. May, have you made yourself familiar
3 with the customers that AmerisourceBergen has had during the
4 time period that is at issue in this case, which is 2006 to
5 2018, for the City of Huntington and the County of Cabell?

6 **A.** I have reviewed data and information relative to that
7 customer base, yes, and familiarized myself with them.

8 MS. MCCLURE: Richie, could you pull up that
9 customers demonstrative, please?

10 BY MS. MCCLURE:

11 **Q.** And, Mr. May, based on that familiarization, is this a
12 full representation of every one of the customers that
13 AmerisourceBergen serviced at any point between the years
14 2006 and 2018?

15 **A.** Am I looking at the only page in the document?

16 **Q.** So, this is 2006 to 2018.

17 **A.** Thank you.

18 **Q.** And then we will go through each year.

19 **A.** Thank you. So, yes, I mean, again, we have tens of
20 thousands of customers. I have focused on the customers in
21 preparation of this testimony and I recognize many of the
22 names here as being customers in Cabell County between 2006
23 and 2018.

24 **Q.** Okay.

25 MS. MCCLURE: And then, Richie, could we flip

1 through 2006?

2 BY MS. MAY:

3 Q. So, this is the customers as of 2006; is that correct,
4 Mr. May, based on your review?

5 A. Yes.

6 Q. Okay. 2007, a couple went away. '08. '9. 2010.
7 '11. '12. '13. '14. '15. '16.

8 So, by 2016, there's nine customers listed there,
9 correct?

10 A. Correct.

11 Q. And based on your understanding, are the five on the
12 left hospitals?

13 A. Yes.

14 Q. And the one in the center there, Medical Park, is that
15 an independent pharmacy? Oh, I'm sorry. "LTC", what does
16 that mean?

17 A. That's a long-term care pharmacy specializing in caring
18 for end-of-life patients.

19 Q. Okay. And then from --

20 THE COURT: Those are all in Cabell County; is
21 that right?

22 MS. MCCLURE: Or the City of Huntington.

23 THE WITNESS: Yes, sir.

24 THE COURT: And the City of Huntington has just a
25 little bit that flips over into Wayne County, I believe; is

1 that right?

2 MS. MCCLURE: Yes. Yes. But the majority of the
3 City of Huntington is encompassed within Cabell County.

4 THE COURT: All right.

5 BY MS. MCCLURE:

6 Q. And a couple of Walgreens on the bottom right?

7 A. Correct.

8 Q. And that's a chain, correct?

9 A. It is, yes.

10 Q. Okay. 2017, okay, we've lost that long-term care.
11 2018. So, looks like here we've added -- we still have the
12 hospitals on the left, a couple of independent or long-term
13 care in the center and -- at the top, and then several
14 Walgreens at the bottom. Do you know where those -- why
15 those were all added in 2018?

16 A. Yes, and Walgreens had acquired numerous Rite Aid
17 Pharmacies during this period of time and they converted
18 those Rite Aid locations to the Walgreens brand.

19 Q. Okay.

20 MS. MCCLURE: Your Honor, may I have a moment to
21 confer with co-counsel?

22 THE COURT: Yes.

23 (Pause)

24 MS. MCCLURE: Your Honor, at this time, I have no
25 further questions subject to Mr. Farrell or --

1 THE COURT: All right. Is there any redirect of
2 Mr. May?

3 MR. PIFKO: Your Honor, we do have some questions.
4 Maybe I'll request a short recess and then we can ask our
5 questions. I'll try to keep it very brief.

6 THE COURT: Okay. Let's take about ten minutes.
7 And you can step down, Mr. May.

8 THE WITNESS: Yes, sir. Thank you.

9 THE COURT: And we'll have you come back.

10 THE WITNESS: Thank you.

11 (Recess taken)

12 MR. PIFKO: Good afternoon, Your Honor. Mark
13 Pifko for plaintiffs.

14 REDIRECT EXAMINATION

15 BY MR. PIFKO:

16 **Q.** I just have a few topics. I'll try to keep this
17 very brief. I know it's the afternoon.

18 Mr. May, from Friday -- I believe you should have all
19 the exhibits in front of you from your prior testimony. I'd
20 like you to pull out Number 898 from Friday, and
21 specifically if I can ask you to direct your attention to 5.
22 The slide says 4, but then if you look at the P-0898 it says
23 5 on the bottom.

24 **A.** I think we're on the same spot, yes.

25 **Q.** We're there? All right. Thanks. Great. So we talked

1 about the baskets of the Diversion Control Program. And one
2 of them was this idea of knowing your customer. Right?

3 **A.** Correct.

4 **Q.** So here you're talking about in this slide that -- what
5 you say in the notes you don't see specific reference to
6 knowing your customer in the law and regulations. And you
7 go on to explain that you see a concept in other places. Do
8 you see that?

9 **A.** I do.

10 **Q.** So you agree that something can be part of the
11 Diversion Control requirements without necessarily being
12 expressly in the regulations; correct?

13 MS. MCCLURE: Objection, Your Honor, calls for a
14 legal conclusion. I think Mr. Pifko can ask Mr. May about
15 this specific requirement. But the question was changed to
16 be something and more broad than Mr. May -- than this slide
17 reflects.

18 THE COURT: Well, overruled. I think, I think
19 it's a proper question. Go ahead. You can answer it.

20 THE WITNESS: Thank you, sir.

21 I believe that there are certain parts of our program
22 that are administered, the Diversion Control Program. And I
23 believe they're done for a reason. Are they expressly
24 stated in the laws or regulations? I, I don't think you see
25 due diligence anywhere. But we do perform diligence on our

1 customers. But it's not because I believe that, that the
2 law requires it. It's more that I think it's appropriate
3 for our program.

4 BY MR. PIFKO:

5 **Q.** Well, you have here on this slide -- you have in
6 red 21, C.F.R., 1301.7(1)(a) where it talks about how
7 applicants and registrants shall provide effective
8 controls and procedures. Do you see that?

9 **A.** I do.

10 **Q.** And you have the words "effective controls" in bold
11 there?

12 **A.** I do.

13 **Q.** You agree that that part of the regulation can
14 encompass other aspects of Diversion Control like the idea
15 of providing effective controls and require things like
16 knowing your customer? Is that what you're trying to convey
17 in this slide?

18 **A.** I have the notations for the regulations written. I
19 believe this is the NADDI presentation. I have those
20 regulations up there so that the law enforcement community
21 I'm addressing understands what the regulations are.

22 And then I'm speaking first of the one in red
23 presumably because it's highlighted here under these notes.

24 Again, I, I would, I would say that we have a program.
25 Some of the things that we do in our program are not in the

1 laws or regulations. You won't find them there.

2 And, so, to the extent that we do these things even
3 though they're not in the law or regulations, that would be
4 my response.

5 **Q.** Let's go a little further back in the same presentation
6 to Page 18. You're talking about the closed system here.
7 And partway through the notes -- I'll let you get there.

8 **A.** I'm sorry.

9 **Q.** Take your time.

10 **A.** Yes.

11 **Q.** Okay. So about halfway down there you are talking
12 about the closed system here. And you say, "To that end --"
13 do you see that part?

14 **A.** I do.

15 **Q.** Okay. "To that end, a wholesaler is responsible --"
16 you mean wholesale distributor there?

17 **A.** I do.

18 **Q.** "A wholesaler is responsible for knowing the customer
19 and monitoring the controlled substances and listed
20 chemicals shipped to that customer and rejecting and
21 reporting suspicious orders."

22 **A.** I see that, yes.

23 **Q.** Okay. Do you agree that those are the three components
24 that a wholesale distributor is responsible for?

25 **A.** I think that from our program at AmerisourceBergen

1 these are things that we do include in our program; knowing
2 the customer, monitoring the controlled substance and listed
3 chemicals shipped to the customer, and rejecting suspicious
4 orders. Those are all things that we've spoken about here
5 that we do at AmerisourceBergen.

6 **Q.** And you believe that through the closed system that a
7 distributor is responsible for handling those attributes;
8 correct?

9 **A.** I believe as -- in the, in the closed system which
10 requires certain registrants to perform certain actions,
11 certainly reporting suspicious orders and having effective
12 controls in place is part of the wholesale distributor's
13 requirements.

14 **Q.** And that includes knowing your customers and also
15 rejecting suspicious orders as well?

16 MR. RUBY: Objection, Your Honor, vague as to
17 time.

18 THE COURT: Overruled.

19 THE WITNESS: Again, going back to the notion
20 knowing our customer, something that we, we do in the
21 current program, something we've done in the past program,
22 something that I think we should do. So absolutely no
23 debate there.

24 I guess where we're getting hung up is in the
25 regulations somewhere which we don't find it there. And

1 reporting suspicious orders, that clearly falls upon the
2 manufacturer and distributor within this closed system of
3 distribution.

4 BY MR. PIFKO:

5 **Q.** I want to -- I know you talked for quite a few
6 hours, so you may not remember everything you said over
7 the course of today. But one of the comments you made
8 before the lunch break was that the regulation is silent
9 on the issue of canceling orders. Do you recall saying
10 something to that effect?

11 **A.** Yes. So specifically when it came to our discussion
12 about suspicious order reporting, once the order is reported
13 as suspicious, my statement was that the, the regulation is
14 silent on whether or not that suspicious order may be
15 shipped by the practice -- by practice at AmerisourceBergen.

16 Since I've been there and prior to my arrival at
17 AmerisourceBergen, we do not ship suspicious orders because
18 it's my understanding that that is the regulator expectation
19 going back and -- but, again, the, the regulation is silent
20 on the issue.

21 **Q.** Do you recall -- I believe I asked you on Friday that
22 you were deposed in this matter by me in 2018?

23 **A.** Yes.

24 **Q.** I believe on August 4th. Does that sound right?

25 **A.** Sounds right.

1 Q. Okay. I wanted to try to clarify your statement that
2 you made today with the statement that you made then.

3 Do you recall saying that in terms of suspicious
4 orders, your understanding of the law and regulation
5 requires us to reject them, cancel them, and report them to
6 the DEA?

7 MS. MCCLURE: Your Honor, objection. I don't
8 believe this is proper impeachment for Mr. Pifko to
9 apparently be reading from a transcript without establishing
10 any inconsistency. I believe he's just quoted Mr. May's
11 prior testimony back to him, but there's no support for
12 permitting it.

13 THE COURT: Where's the inconsistency Mr. Pifko?

14 MR. PIFKO: I wasn't trying to -- I was trying to
15 clarify. I wasn't saying it was necessarily inconsistent.
16 If you'll allow me a little leeway, I can flush that out
17 further.

18 THE COURT: Well, I'll sustain the objection. I
19 don't think that's a right way to get at it.

20 BY MR. PIFKO:

21 Q. Okay. Where I'm going, Mr. May, is that even
22 though the -- you testified that the regulation is
23 silent on the issue of canceling, it can still be the
24 case that the, even though it might be -- the face of
25 the regulation might not say that, that the law can

1 still require you to cancel and report orders if they're
2 suspicious. Agreed?

3 MS. MCCLURE: Your Honor, objection. It calls for
4 a legal conclusion and --

5 THE COURT: Sustained.

6 MS. MCCLURE: -- I think this is a back door to
7 what --

8 THE COURT: Sustained. I think it's a confusing
9 question too.

10 BY MR. PIFKO:

11 **Q.** Do you recall talking about the, the dashboards
12 earlier?

13 **A.** Yes.

14 **Q.** Okay. And that was a program that you developed with
15 FTI Consulting?

16 **A.** Well, it wasn't a program. It was taking software and
17 then creating these easily accessible dashboards through the
18 software as opposed to programming. I'm not very technical,
19 but that's how I would describe it.

20 **Q.** And do you recall Ms. McClure showed you -- I mean, we
21 looked at a couple screen shots. But one of them included a
22 screen shot of some customers from Cabell County from, for
23 Drug Emporium and McCloud? Do you recall that?

24 **A.** Yes, I do.

25 **Q.** That was AM-WV-01040-E. Do you want to put that in

1 front of you for a moment?

2 So what's the time period of transactions that's being
3 reflected in this dashboard?

4 **A.** So on the bottom of the dashboard you can see that it's
5 indicated on the bottom right-hand corner data through 4-17,
6 2015. Do you see that?

7 **Q.** Okay.

8 **A.** And, so, this dashboard contains both essentially three
9 months worth of data for this particular production. And I
10 guess there could be different data points within that that
11 extends beyond that three months. I guess it depends on
12 which we're looking at because I do see, for example, on --
13 under Product Family Distribution it says 12 months. And,
14 so, that's 12 months worth of data. But most of the other
15 data fields that you see are, are this three-month time
16 period. It's a little confusing.

17 MS. MCCLURE: Your Honor, this is one of the
18 dashboards. I just want to make sure that this dashboard is
19 not being displayed to the overflow room and if we could
20 take that down if it is.

21 THE COURT: You're right. Are we sure this is not
22 being displayed?

23 THE CLERK: It's still on.

24 THE COURT: It's still on in the display?

25 THE CLERK: Nobody told me. It's off now.

1 THE COURT: This one needs to be deleted, I mean,
2 from -- not shown to the other room.

3 MS. MCCLURE: Thank you, Your Honor. I was not
4 aware that they were going to be offering the dashboard from
5 today.

6 THE COURT: Okay. Go ahead, Mr. Pifko.

7 BY MR. PIFKO:

8 Q. Mr. May, have you ever used the OMP dashboard tool
9 to study historical or ordering patterns that date prior
10 to 2015?

11 A. These -- this particular set of tools we developed with
12 FTI were first being produced in 2015. Prior to that time,
13 and we spoke about this earlier today, we were using a
14 series of spreadsheets which would have included that OMP
15 size report and then the different trending reports.

16 Q. But these Tableau graphic tiles were not used prior to
17 2015; correct?

18 A. That's correct.

19 Q. And the data contained to make the analysis in here
20 doesn't go back further than 2015; is that correct?

21 MS. MCCLURE: Objection, misstates the witness's
22 testimony.

23 THE COURT: Well, I don't remember whether it does
24 or not.

25 Can you answer the question?

1 THE WITNESS: I think that the majority of the
2 data in that dashboard was limited to three months prior to
3 production of the dashboard which I believe -- it's not up
4 now -- was April of 2015 if I have that correct.

5 But there was one section of the dashboard that
6 reflected historical data that looked like it went back that
7 was more limited in time.

8 So what's happening there is FTI has the production of
9 the dashboard in 2015 but was able to go back and grab
10 transactional data that they could have populated that with
11 just from that previous 12 months. Certainly it doesn't
12 look like it extended beyond that.

13 BY MR. PIFKO:

14 Q. Okay. So it didn't extend -- the data in the
15 dashboard doesn't extend beyond 2014 at the earliest?

16 A. That's what it bears, yes, correct.

17 Q. I want you to look back at 898 again, specifically on
18 Page -- using the P-898 number, Page 8.

19 A. Yes.

20 Q. About halfway down the page there, you have some notes
21 here. And, again, you were speaking to diversion
22 investigators at this presentation?

23 A. Correct.

24 Q. You say, "If our common goal is to detect, identify,
25 and prevent diversion, I think that a much more effective

1 way of doing that is not by identifying a specific order in
2 time by a customer but by analyzing and reviewing the
3 ordering behavior of that customer over a period of time."

4 Do you see that?

5 **A.** I do.

6 **Q.** Do you agree with that statement?

7 **A.** I agree that my assessment of the efficacy of
8 individual order reporting, it's in the regulation. I
9 believe it serves a purpose. And I believe that it has a
10 value to it.

11 But in my view, having administered the program, I also
12 believe that it's very helpful to look at historical data in
13 terms of the customer's purchasing of, of controlled and
14 non-controlled substances. I think there's a value to that.

15 **Q.** With respect to Drug Emporium and McCloud, the
16 pharmacies that were shown in that prior exhibit, did you at
17 any time undertake any effort to look back at the historical
18 ordering patterns of whose customers?

19 **A.** So in, in reviewing our customers and some of the data
20 associated with those customers that were in Cabell County,
21 I've reviewed that data. We had the list of all those
22 customers up there. It's quite a bit of data over quite a
23 bit of time. I believe the Drug Emporium was a customer of
24 AB for some 20 odd years. So I did look at the, the data as
25 part of my review process.

1 Q. Okay. You looked at going back as far as they were a
2 customer?

3 A. No, I don't have that data that far back. I looked, I
4 looked at the data that was available to me and, again, not
5 trying to go back further than 2006.

6 Q. Okay. I want to hand you a document, P-43225.

7 May I approach, Your Honor?

8 THE COURT: Yes.

9 THE WITNESS: Thank you.

10 MS. MCCLURE: Your Honor, I have an objection
11 about this document. I believe that this may be a document
12 from Mr. McCann who was the expert who testified during the
13 early part of last week.

14 It contains, it looks like, dosage units, summaries for
15 AmerisourceBergen and for McKesson and for Cardinal. So I
16 would object to the extent that this McCann document is now
17 being used with Mr. May who's --

18 THE COURT: Well, where are you going --

19 MS. MCCLURE: -- never seen -- he's never seen
20 this document before and I object to Mr. McCann documents
21 being used with this witness.

22 MR. PIFKO: This is one of the exhibits that was
23 admitted through Dr. McCann's testimony. And Mr. May
24 testified that he did familiarize himself with customer data
25 from the customers in Cabell County. I just wanted to ask

1 him a couple questions about some of the numbers in here.

2 THE COURT: Was it admitted through Dr. McCann's
3 testimony?

4 MR. PIFKO: My understanding is that it was.

5 MR. HESTER: Well, Your Honor, we understood that
6 there was only a conditional admission and that the Court
7 still has to recall on the 1006 issue which is still
8 pending.

9 THE COURT: Well, --

10 MS. MCCLURE: Your Honor, I agree with that. I
11 believe that there's not been confirmation that the
12 defendants' 1006 objections have been ruled on. So I think
13 that these -- to the extent that anything was admitted, I
14 believe it was conditional. So I don't think it has been
15 admitted yet. And, regardless, nevertheless, even if it had
16 been admitted, I would object to it being presented to
17 Mr. May.

18 MR. PIFKO: Your Honor, part of my understanding
19 of the conditional admission of the document was that we
20 could ask witnesses about it.

21 THE COURT: Well, I'm going to let you use it. Go
22 ahead.

23 MR. PIFKO: Thank you, Your Honor.

24 BY MR. PIFKO:

25 Q. Mr. May, I'm only going to ask you about

1 information in the first four pages that concern
2 AmerisourceBergen. So you don't have to worry about the
3 other parts of it.

4 You see here there's -- the first chart is oxycodone
5 dosage units and it's got data going from 2006 to 2014 for
6 the first three pages. Do you see that?

7 **A.** I see that, yes.

8 **Q.** Okay. And as you go on the columns, the columns are
9 various customers. Do you see that?

10 **A.** I do.

11 **Q.** It says here that over the time period covered here,
12 2006 to 2014, AmerisourceBergen distributed 1,946,980
13 dosage units of hydrocodone to McCloud. Is that consistent
14 with what your understanding is from reviewing the data?

15 MR. HESTER: Objection, lack of foundation, Your
16 Honor.

17 MS. MCCLURE: Same objection, Your Honor. I also
18 object to the point that we, I believe, established that
19 Mr. McCann had not included returns in his analysis.

20 So his analysis was by definition going to not include
21 certain, certain -- returns of certain dosage units that
22 have been returned to AmerisourceBergen. And I believe that
23 that problem infects this document.

24 MR. PIFKO: Your Honor, my recollection of that
25 testimony was -- I mean, I think Dr. McCann disagreed with

1 defendants' assertion. But, in any event, that was only
2 15,000 dosage units. I'm asking about a number that's
3 almost two million here.

4 MS. MCCLURE: So, Your Honor, we made the point as
5 an example with one shipment for one customer. That does
6 not mean that the issue was limited to that one example.

7 So I do believe that Mr. McCann did testify that he did
8 not include returns in his analysis and summary. So that
9 problem could affect the entire chart.

10 THE COURT: Well, this is -- even though the
11 plaintiff called this witness, this is in the nature of
12 cross-examination. I'm going to overrule the objection and
13 let you ask him a couple questions here, but don't belabor
14 the point.

15 MR. PIFKO: Thank you, Your Honor.

16 BY MR. PIFKO:

17 **Q.** Again, Mr. May, based on your familiarity with
18 reviewing the data, is it consistent with your
19 understanding that AmerisourceBergen shipped
20 approximately 1,946,980 dosage units of oxycodone to
21 McCloud?

22 **A.** So when I reviewed the data, I was relying upon the
23 data that's available to me through SAP and our own, our own
24 programs and systems.

25 I guess to the extent that I did review data, I, I

1 certainly didn't prepare to the level where I can say I
2 reviewed X pharmacy and I know during the period of 2006 to
3 2014 they distributed X amount of dosage units. I couldn't
4 do that in any manner for any of the pharmacies that I
5 reviewed in preparation for here today.

6 BY MR. PIFKO:

7 **Q.** How about for Drug Emporium? It's got 1,458,500.

8 MS. MCCLURE: Your Honor, at this point, Mr. May
9 has said, "I cannot do that for any of the pharmacies."

10 Mr. Pifko is testifying by highlighting the document
11 and reading into the record numbers that Mr. May is saying,
12 "I can't do that."

13 THE COURT: Yeah, I'm going to sustain the
14 objection. He couldn't answer your last question and this
15 is in the nature of the same type of question. So I'll
16 sustain the objection.

17 BY MR. PIFKO:

18 **Q.** When we were looking at Exhibit 898, you talked
19 about looking at customer's ordering patterns. Do you
20 recall that?

21 **A.** Yes.

22 **Q.** And then at some point in your testimony earlier today
23 I believe you talked about the totality of the circumstances
24 test. Do you recall that?

25 **A.** Yes.

1 Q. And talking about suspicious orders and documenting it
2 in the customer file. Do you recall that?

3 A. I do.

4 Q. I want to understand for purposes of the record, the
5 customer file, that's in those databases that we talked
6 about on Friday, right, that was currently Archer and it
7 used to be Lawtrac and I think there was a third one? Is
8 that correct?

9 A. You're correct. It's currently Archer which was
10 preceded by Thomson Reuters. And we referred to that as
11 Matter Management which was preceded by Lawtrac.

12 Q. Okay. And those files contained your information about
13 the customer including due diligence information?

14 A. That's correct. Just one point on the suspicious order
15 report being included in the Archer file. That is a recent
16 development where we set up this automated download from our
17 EIP to Archer. That did not exist prior.

18 That doesn't mean that we would not include information
19 about suspicious orders maybe in a commentary, but just
20 wanted to clarify that that was a recent development.

21 MR. PIFKO: Can I get Plaintiffs' Exhibit 17140?

22 Permission to approach?

23 THE COURT: Yes.

24 THE WITNESS: Thank you.

25 BY MR. PIFKO:

1 **Q.** Earlier in your testimony Ms. McClure showed you
2 part of this document which was Defendants' Exhibit
3 AM-VW-00121 [sic]. Take a minute to review Plaintiff's
4 Exhibit 17140 and let me know when you're ready.

5 (Pause)

6 **A.** Yes, sir.

7 **Q.** Are you familiar with the discussion that is being
8 reflected in Exhibit 17140?

9 **A.** Yes.

10 **Q.** And you agree this is the -- contains additional
11 responses from the Exhibit AM-WV-00121?

12 **A.** Was that the exhibit from Ms. McClure earlier?

13 **Q.** Yes.

14 **A.** It looks like this is -- it's an extension of that
15 original email because at the beginning of this email chain,
16 I see the original request from DEA, so I would say "yes."

17 **Q.** Can you tell me what's being reflected in Exhibit
18 17140?

19 **A.** It's -- all of this is relative to our response to a
20 DEA request for information that was generated based upon
21 their cyclical inspection of our Ohio facility.

22 **Q.** And that's your name at the top as the recipient of
23 this email from Eric Cherveney; correct?

24 **A.** Yes.

25 MR. PIFKO: Plaintiffs move for 17140 into the

1 record.

2 THE COURT: Any objection?

3 MS. MCCLURE: No, Your Honor.

4 THE COURT: It's admitted.

5 BY MR. PIFKO:

6 **Q.** Do you know who Jesse Freese is? Am I saying the
7 name right?

8 **A.** Just only that he's the Diversion Investigator from DEA
9 Columbus that initiated the request back in September of
10 2015.

11 **Q.** Okay.

12 **A.** I don't know him beyond the name that's written on the
13 email.

14 **Q.** It's got his title here on Page 4 of the exhibit. Do
15 you see that?

16 **A.** I do see "Diversion Investigator."

17 **Q.** Do you know what a diversion investigator is?

18 **A.** Yes.

19 **Q.** Can you tell the Court what a diversion investigator
20 is?

21 **A.** Well, it's -- the coding for it is in the Federal
22 Government in 1810 versus an 1811 which is Special Agent.
23 And it's the, it's the title of the position for those folks
24 that work within Diversion Control.

25 **Q.** And those are the people dealing with the diversion

1 regulations at DEA?

2 **A.** They do deal with them, yes.

3 **Q.** And, so, here this diversion investigator is conducting
4 an audit of AmerisourceBergen's Columbus facility or also
5 known as Lockbourne; is that correct?

6 **A.** Yes.

7 **Q.** And, to your knowledge, that's the distribution center
8 that serves customers in Cabell County and Huntington;
9 correct?

10 **A.** It does, yes.

11 **Q.** And, so, the diversion investigator here is asking for
12 copies of the due diligence files for several customers. Do
13 you see that?

14 **A.** I do, yes.

15 **Q.** And includes Continuum Care Pharmacy, McCloud, and Drug
16 Emporium; correct?

17 **A.** Yes.

18 **Q.** Do you have an understanding as to why DEA was asking
19 for due diligence files for those customers?

20 **A.** DEA will frequently ask during -- more so as of late --
21 frequently ask for due diligence files associated with
22 certain customers being serviced at the distribution center.
23 That's generally a part of their inspection process.

24 **Q.** There's some discussion then between Eric Cherveney and
25 others and then he forwards the front page to you. Who's

1 Eric Cherveney?

2 **A.** Eric Cherveney was a former Director of Diversion
3 Control and he replaced Ed Hazewski who I think I explained
4 in prior testimony had retired from AmerisourceBergen.

5 **Q.** So the discussion here is about the various people in
6 the department looking for some of the files that were
7 requested; agreed?

8 **A.** Yes.

9 **Q.** If you turn to the first page, Mr. Cherveney provides
10 you an update a few days after the request. We see bullet
11 points on the various pharmacies that were included in the
12 request. Agreed?

13 **A.** Yes.

14 **Q.** And, so, for McCloud it says, "Lawtrac matter is
15 empty." Do you see that?

16 **A.** I do see that.

17 **Q.** It says "Requesting hard file from Iron Mountain - file
18 not found." Do you see that?

19 **A.** I do.

20 **Q.** For Drug Emporium it says, "Lawtrac matter is empty."
21 Do you see that?

22 **A.** I do. I'm a little confused on McCloud because it
23 said, "590 in file is from 2010." So I'm not sure what
24 they're referring to when they say it's from 2010 when above
25 it says it's empty. So the context of that I'm a little

1 confused on but, sorry.

2 **Q.** It also says -- this, this email is written in 2015.
3 So it says "ordering updated one." Even if there is one in
4 2010, that would be five years old at that point?

5 **A.** Yes.

6 **Q.** Going down to Drug Emporium, then, so it says, "Lawtrac
7 matter is empty," there. Agree?

8 **A.** Yes.

9 **Q.** I think I asked you about this on Friday, but I just
10 want to clarify for the record. When you started your
11 position, it was new; correct?

12 **A.** I'm sorry, sir?

13 **Q.** When you started your position, it was a new position?

14 **A.** It was a new position, yes.

15 **Q.** And who was performing some of the responsibilities
16 that you now perform before you took over the position, or
17 when you started this position?

18 MS. MCCLURE: Your Honor, I believe that this was
19 asked and answered last Friday but --

20 THE COURT: I agree. Sustained.

21 MR. PIFKO: I just want to check -- we were trying
22 to print something during the break. I want to check on
23 that. And aside from that, I don't have any further
24 questions.

25 THE COURT: All right. You may do so.

1 (Pause)

2 MR. PIFKO: I don't have any further questions.

3 THE COURT: All right.

4 Do you have anything else, Ms. McClure?

5 MS. MCCLURE: Yes, Your Honor, very briefly.

6 RECROSS EXAMINATION

7 BY MS. MCCLURE:

8 Q. Mr. May, on this P-17140 --

9 A. Yes.

10 Q. -- for Number 1, Pharmacy Associates, can you read what
11 the bullet says there?

12 A. "Lawtrac matter contains all required docs."

13 Q. For Number 6 can you read the bullet, the first bullet
14 under Continuum Care Pharmacy?

15 A. "Old PharMerica customer."

16 Q. And then what's the parentheses?

17 A. "Chain."

18 Q. What does "chain" mean?

19 A. Chain -- we consider a chain pharmacy to be any
20 pharmacy numbering ten or more locations with common
21 ownership.

22 Q. Do you have an understanding as to whether DEA ever
23 advised AmerisourceBergen that chains were exempt from due
24 diligence?

25 A. My understanding was that when it came to the

1 questionnaire that was agreed upon in 2007 that that
2 questionnaire was specifically for independent pharmacies is
3 my understanding.

4 **Q.** Okay. Can you just go to Number 7, McCloud?

5 **A.** Yes.

6 **Q.** You've noted in the fourth bullet it says, "590 in file
7 is from 2010." Do you understand that to mean that the
8 McCloud file had a 590 in it?

9 **A.** That's my understanding.

10 **Q.** And the note above that is, "Requested all microfiche
11 documentation." What does that mean?

12 **A.** I believe Sheri France was in -- assigned to customer
13 maintenance. And -- but beyond that, I don't know what that
14 means.

15 **Q.** Okay.

16 **A.** Sorry.

17 **Q.** The last bullet there, "Reference is made to a 590
18 completion in Lawtrac matter." What does that indicate to
19 you?

20 **A.** So you see a number there beginning with RA. That
21 stands for Regulatory Affairs which indicates that a, a
22 matter, or a file was open for the customer. And,
23 otherwise, that number would not have been generated.

24 And, so, the reference to a 590 completion would then
25 make sense in light of the fact that a matter was created.

1 **Q.** Okay. Number 8, Walgreens. The first bullet, "Will
2 pull WAG chain spreadsheet." What does that mean, a chain
3 spreadsheet?

4 **A.** So getting back to common ownership, how we handle
5 chains as opposed to giving -- or asking the pharmacy for
6 the completion of an independent questionnaire in order to
7 obviously avoid redundancy around questions concerning
8 ownership, we create a spreadsheet.

9 And that spreadsheet contains, I would say, about
10 80 percent of the information that we glean from the
11 individual pharmacy questionnaire except for those redundant
12 questions. And that's how we manage the due diligence
13 documentation for our chain customers.

14 **Q.** Okay. So is it fair to say that for this chain
15 customer, Walgreens, we had essentially the bulk of the
16 information that would have been in a 590, but it was just
17 in a spreadsheet instead of a questionnaire?

18 **A.** That's correct. It would contain all of the
19 information we required for our chain in the spreadsheet.

20 **Q.** Number 9, Drug Emporium. The second bullet says,
21 "Requesting hard file from Iron Mountain." What does that
22 mean?

23 **A.** There was a period in time where AmerisourceBergen was
24 saving hard copy documents. And eventually, like most
25 businesses, we went to digital formatting and recording.

1 And between that time, or during that process, there
2 were documents that were stored at Iron Mountain. And this
3 is our request relative to Drug Emporium to see if they had
4 any, any hard copy documents available to us.

5 **Q.** Okay. And, Mr. May, have you seen any, any information
6 or do you recall DEA coming back to you at any point for
7 this list of pharmacy due diligence files and saying these
8 due diligence files are inadequate or this is not in
9 compliance with the regulation?

10 MR. PIFKO: Objection, hearsay.

11 THE COURT: Pardon me?

12 MR. PIFKO: I said objection hearsay to the extent
13 what DEA might have said to him.

14 MS. MCCLURE: Your Honor, --

15 THE COURT: Overruled.

16 THE WITNESS: I, I don't recall getting any
17 additional update from DEA on this request. And to the
18 extent that we still say that we're waiting for certain
19 things, I just don't have a recollection. I have no
20 recollection of being contacted further on this matter
21 beyond what is listed here.

22 BY MS. MCCLURE:

23 **Q.** Okay. And this is September of 2015.

24 **A.** Uh-huh.

25 **Q.** Do you recall looking at the Drug Emporium and McCloud

1 family dashboards from earlier, those Tableau files?

2 **A.** Yes.

3 **Q.** Do you recall that that information was through April
4 of 2015?

5 **A.** Correct.

6 **Q.** And, so, at this point in September of 2015, is it fair
7 to say that those dashboards are available for both order
8 review and on-going customer due diligence to your Diversion
9 Control Team?

10 **A.** I think that was -- I believe that was part of my
11 testimony on Friday where we talked about what defines due
12 diligence.

13 And, and from my perspective what defines due diligence
14 is not only these sorts of documents, but also the day in
15 and day out ordering by the customer, the Order Monitoring
16 Program, and those continuous due diligence efforts around
17 those analytical reports which I would argue carry the most
18 value because it shows the transactional history of the
19 customer.

20 MS. MCCLURE: Your Honor, one moment.

21 (Pause)

22 MS. MCCLURE: Thank you, Mr. May. I have no
23 further questions.

24 THE WITNESS: Thank you.

25 THE COURT: Do you have anything else, Mr. Pifko?

1 MR. PIFKO: No, Your Honor.

2 THE COURT: May Mr. May be excused?

3 Hearing no objection to that, I'm going to let you go,
4 Mr. May. Thanks for your time and being here to help us out
5 and you're free to go.

6 THE WITNESS: Thank you, sir.

7 THE COURT: You can call your next witness.

8 MR. FARRELL: Plaintiffs call Steve Mays.

9 THE COURT: Mr. Mays, just come up here and the
10 clerk will give you the oath, sir.

11 THE CLERK: Please state your name.

12 THE WITNESS: Stephen Mays.

13 THE CLERK: Thank you. Please raise your right
14 hand.

15 **STEPHEN MAYS, PLAINTIFFS' WITNESS, SWORN**

16 THE CLERK: Thank you. Please take a seat.

17 MR. FARRELL: A piece of housekeeping, Judge. May
18 I approach the bench very quickly?

19 THE COURT: Yes.

20 DIRECT EXAMINATION

21 BY MR. FARRELL:

22 **Q.** Please state your name.

23 **A.** Stephen Mays.

24 **Q.** And which of the parties here are you identified with?

25 **A.** AmerisourceBergen.

1 Q. What is your current title and role?

2 A. Vice President of Regulatory Affairs.

3 Q. How long have you been serving in that capacity?

4 A. About five years I think.

5 Q. What was your title prior to that?

6 A. Senior Director of Corporate Security Regulatory
7 Affairs.

8 Q. Is that the position that Mr. May now holds?

9 A. No. He's Vice President of Diversion Control.

10 Q. So could you take a moment and explain what your title
11 and responsibilities were prior to 2014 and what your role
12 and responsibilities were after 2014 when Mr. May arrived?

13 A. Okay. So prior to -- I don't know how far back you
14 want me to go.

15 Q. I'm just trying to get an understanding of the division
16 of responsibilities with respect to you when Mr. May
17 arrived.

18 A. So when Mr. May arrived, I was the Senior Director of
19 Regulatory Affairs and I oversaw all regulatory compliance
20 for the company for drug distribution.

21 Q. Did that include Diversion Control?

22 A. That included Diversion Control for -- from 2007 to
23 about 2010, something like that, yes.

24 Q. And then who was in charge of Diversion Control from
25 2010 on?

1 **A.** I believe Ed Hazewski ran the program until David came.

2 **Q.** And then was there any overlap? Did Mr. May take over
3 Mr. Hazewski's responsibilities?

4 **A.** Not that I know of, no. No overlap?

5 **Q.** I'm sorry. So Mr. Hazewski was in charge of Diversion
6 Control from 2010 until when?

7 **A.** I think until David came in about 2012, 2013, something
8 like that.

9 **Q.** A couple of housekeeping measures. It's my
10 understanding that on behalf of AmerisourceBergen you were
11 the individual that was present during the August 10, 2005,
12 meeting with the DEA. Do you recall that?

13 **A.** Yes, sir, I do.

14 **Q.** And do you recall that materials were presented to you
15 by the DEA?

16 **A.** Yes, sir.

17 **Q.** Did you then take those materials and relay them on to
18 those within Diversion Control?

19 **A.** That's correct.

20 MR. FARRELL: Judge, I'm going to reference 8813,
21 P-8813. May I approach?

22 BY MR. FARRELL:

23 **Q.** Sir, I'll represent to you that these are materials
24 that came from your custodial file produced by
25 AmerisourceBergen that have already been discussed and

1 referenced. So I'm not going to go through them in
2 great detail. But I'd ask you to take a look at this
3 document and tell me if you can identify it.

4 **A.** Yes, sir. These are all the materials that were
5 presented to me in a binder at the meeting.

6 MR. FARRELL: Judge, I'd ask for P-8813 to be
7 admitted.

8 THE COURT: Any objection?

9 MS. MCCLURE: No, Your Honor.

10 MR. HESTER: Your Honor, it has a bit of hearsay
11 in it, so we object on hearsay grounds to the introduction
12 of the document insofar as it's being introduced for the
13 truth.

14 THE COURT: Does it come in for the truth,
15 Mr. Farrell?

16 MR. FARRELL: It comes in for truth of what was
17 communicated to Mr. Mays during the meeting. Whether or
18 not -- whether or not what was communicated was true I'll
19 leave for the finder of fact.

20 THE COURT: So you're saying it comes in for the
21 limited purpose of showing his state of mind and, thereby,
22 AmerisourceBergen's state of mind at the time and not for
23 the truth of the matter asserted.

24 MR. FARRELL: Yes, Your Honor.

25 MS. WICHT: It was the same objection, Your Honor.

1 You've taken care of it. Thank you.

2 MS. MCCLURE: I'll join in that too.

3 THE COURT: Well, I'll admit it for that limited
4 purpose.

5 BY MR. FARRELL:

6 Q. Mr. Mays, do you recall discussing with the DEA the
7 United States Supreme Court cases that are referenced in
8 these materials?

9 A. Yes. They didn't go into a lot of detail with them.
10 They just asked me to read those as I had time permitted.

11 Q. And did you, in fact, eventually read them?

12 A. Yeah, I believe I read through all of them.

13 Q. Now, do you recall whether or not you had any follow-up
14 telephone calls with the DEA following this -- regarding
15 this presentation?

16 A. Yes, we did.

17 Q. And do you recall the extent of those conversations?

18 A. Well, I went to the meeting with DEA by myself at their
19 headquarters. And when I got back, I think about a month
20 later we had a follow-up call with them with our legal
21 counsel and my boss, Chris Zimmerman.

22 Q. And at that point in time, were you able to ask
23 questions or clarify any issues that you had with the DEA?

24 A. I don't recall all the details of the follow-up call,
25 but it was basically the same conversation that I had with

1 DEA at their headquarters.

2 **Q.** At that point in time, did you inform the DEA that
3 AmerisourceBergen was in the process of updating its
4 policies and procedures regarding drug control diversion?

5 **A.** I believe that's correct.

6 MR. FARRELL: One more clean-up, Your Honor.

7 BY MR. FARRELL:

8 **Q.** Do you recall receiving a correspondence from the
9 DEA dated December 27th, 2007, the dear -- second "Dear
10 Registrant" letter from Joe Rannazzisi?

11 **A.** I believe we were in possession of that, yes.

12 **Q.** I'm asking you if you personally recall receiving a
13 copy of the letter.

14 **A.** I don't personally remember receiving a copy, no.

15 **Q.** Okay.

16 MR. FARRELL: Judge, I'm going to -- may I
17 approach to refresh the witness's recollection?

18 THE COURT: Yes.

19 MR. FARRELL: And for reference purposes, I'm
20 referencing P-2726.

21 MS. MCCLURE: I don't see that this was the
22 document disclosed for use with Mr. May. So I'm not -- is
23 it -- was it disclosed? I'm trying to determine if we
24 lodged objections to the document last night, but I just
25 don't see it on the list.

1 MR. FARRELL: I'm using it to refresh the
2 witness's recollection. I'm not asking for its admission.

3 MS. MCCLURE: Okay.

4 THE COURT: Refresh his recollection. You haven't
5 shown that it needs to be refreshed yet, have you?

6 MR. FARRELL: I believe I asked him if he
7 specifically reviewed the document and he said he didn't
8 recall. I have an email with him receiving the document. I
9 just wanted --

10 THE COURT: Show it to him -- okay. Go ahead.

11 THE WITNESS: Yes, sir, I recognize the document.

12 BY MR. FARRELL:

13 Q. Sir, having reviewed this document, can you confirm
14 that you, in fact, did receive the December 27th, 2007,
15 correspondence and reviewed it?

16 A. Yes, sir.

17 Q. All right. I'd like to bring up P-32. I think it's
18 the composite exhibit with underscore three. It's going to
19 be the actual letter. We're going to go --

20 MR. FARRELL: Judge, may I approach?

21 BY MR. FARRELL:

22 Q. We're going to go to the very bottom of the
23 document, the very last sentence. Do you see the last
24 sentence here? Can you read it from there, sir?

25 A. Yes, sir.

1 Q. I think it's on your screen. It may be on your screen
2 as well.

3 A. I can see it there.

4 Q. It says, "The determination of whether an order is
5 suspicious depends not only on the ordering patterns of the
6 particular customer, but also on the patterns of the
7 registrant's customer base and the patterns throughout the
8 relevant segment of the regulated industry."

9 Did I read that accurately?

10 A. Yes, sir.

11 Q. Now, Mr. Mays, if I may, you were in charge of
12 Diversion Control for a period of time. And were you aware
13 of the policies and procedures at AmerisourceBergen
14 regarding the monitoring of patterns of orders of
15 prescription opioids?

16 MR. HESTER: Object to form, Your Honor. It's
17 compound.

18 THE WITNESS: Can I answer?

19 THE COURT: I'll sustain it. Break it up and ask
20 him, Mr. Farrell. I'll sustain the objection.

21 MR. FARRELL: Yes, Your Honor.

22 BY MR. FARRELL:

23 Q. While -- during your tenure at AmerisourceBergen,
24 were you familiar with the policies and procedures for
25 Diversion Control?

1 **A.** Yes, sir.

2 **Q.** Okay. Were you responsible in part for the development
3 of some of those policies and procedures?

4 **A.** Yes, sir.

5 **Q.** What time frame of policies and procedures are you
6 familiar with?

7 **A.** From probably the -- from the time of our merger in
8 2001 until -- for the Diversion Control side through
9 probably about the time David May came on board.

10 **Q.** So that would be from approximately 2001 through 2014?

11 **A.** That's correct.

12 **Q.** Are you familiar with the current iteration of
13 AmerisourceBergen's Order Monitoring Program that's been in
14 force since 2014?

15 **A.** No.

16 **Q.** At all?

17 **A.** Not -- just vaguely familiar with it, right.

18 **Q.** So I'm going to ask you that in general between the
19 year 2006 and 2014 was AmerisourceBergen monitoring ordering
20 patterns of particular customers?

21 **A.** Yes, we were.

22 **Q.** Did you study the patterns of your customer base for
23 suspicious orders?

24 **A.** I would say "yes."

25 **Q.** And did you compare the ordering patterns of your

1 customers to the customer base?

2 **A.** That's how our system was designed.

3 **Q.** Okay. So what I would like to do now, Mr. Mays, is try
4 to understand AmerisourceBergen's Order Monitoring Program
5 during your tenure with Diversion Control.

6 MR. FARRELL: Judge, may I approach the screen?

7 THE COURT: Yes.

8 MR. FARRELL: Judge, with your permission, I would
9 like to lead somewhat just to provide some basic elements.

10 THE COURT: Well, I think the Rule 611 permits to
11 you do that, so go ahead.

12 BY MR. FARRELL:

13 **Q.** Mr. Mays, it's my understanding through this
14 litigation that AmerisourceBergen basically had three
15 iterations of its Order Monitoring Program. Does that
16 sound about right?

17 **A.** I think that sounds right. We had one that was created
18 in, I believe, '98 and approved by DEA. And then we had an
19 enhanced program in 2007; and then another enhancement
20 around the time that David came on, about 2013, 2012.

21 **Q.** I'm going to do my best to kind of capture that on this
22 writing.

23 **A.** Okay.

24 **Q.** The first one started in sometime around '98 and it
25 went up to approximately 2007; is that correct?

1 **A.** That's correct.

2 **Q.** And that program we basically -- AmerisourceBergen
3 called OMP, Oscar, Mike, Papa, Order Monitoring Program;
4 correct?

5 **A.** In 2007, yes.

6 **Q.** And then that program was revamped again when Mr. May
7 arrived. And in beginning in 2014 and it took some time to
8 implement it. But from 2014 on, there was a new program,
9 Correct?

10 **A.** It was enhanced, yes.

11 **Q.** Enhanced?

12 **A.** Yes.

13 **Q.** So I'm going to try to divide this up into three
14 different time frames and ask some general questions. Okay?

15 MS. MCCLURE: Your Honor, just a minor note that
16 the 2007 to 2014 time period, which is seven years in that
17 depiction -- and I don't know whether it's a reference on
18 the artist, but probably better than I could draw. But I
19 just note that the '98 to '07 time period is 10 years long.

20 So these, these lines are not representative of the
21 extent of period of time. Is that making sense? In other
22 words, '07 to '14 is seven years. '98 to '07 is nine years.
23 But it looks like a lot longer in the middle.

24 THE COURT: Well, --

25 MS. MCCLURE: Again, to the extent that it's a

1 reflection on the artist --

2 THE COURT: I'm alert to the problem, so I'm going
3 to overrule the objection.

4 MR. FARRELL: Judge, to foreshadow, I left a gap
5 in the middle because that's where I'm going to be spending
6 most of my time writing. I did not intend to distort the
7 timeline.

8 THE COURT: Oh, okay. Well, I think if there's no
9 serious chicanery going on here, Mr. Farrell.

10 MR. FARRELL: I'll reserve comment.

11 BY MR. FARRELL:

12 Q. Okay. So let's start with I think the easy one.

13 And that is the '98 to 2007 time frame. You're familiar
14 with AmerisourceBergen's monitoring of suspicious orders
15 during that time frame; correct?

16 A. Yes.

17 Q. And we have the policies and procedures that were --
18 that we had proffered through a prior witness. I'm going to
19 do my best to fairly summarize them and see if you agree
20 with my interpretation. Okay?

21 A. Okay.

22 Q. During this time frame, what AmerisourceBergen was
23 doing was that it was looking at a 30-day trail of similar
24 customers to create an average. Does that sound about
25 right?

1 **A.** Yeah. I just want to make one point. So the merger of
2 the two companies was in 2001. So it was really -- Bergen
3 Brunswig was the creator of that '98 program that was
4 adopted by the combined company in 2001. But that sounds,
5 that sounds right.

6 **Q.** Now, --

7 THE COURT: Who did Bergen Brunswig merge with,
8 Mr. May?

9 THE WITNESS: Amerisource Corporation.

10 THE COURT: Okay.

11 BY MR. FARRELL:

12 **Q.** Now, once the average was taken, then there was a
13 multiplier of three times added; is that correct?

14 MS. MCCLURE: Your Honor, I'll just note that to
15 the extent Mr. Farrell is examining Mr. Mays on policies,
16 procedures over a period of time that are reflected in
17 documents and essentially now summarizing his own
18 understanding of them and giving what seems to be sort of a
19 pop quiz to Mr. Mays on what is reflected in documents that
20 Mr. Mays could review, I would object to that.

21 THE COURT: Well, I'm -- this is in the nature of
22 cross-examination of an adverse witness and I think I'll
23 allow him to do it. Go ahead.

24 BY MR. FARRELL:

25 **Q.** So, Mr. Mays, in general if we break this down, we

1 are looking at the past month of customers from a
2 distribution center; correct?

3 **A.** I'm not that intimately familiar with the formula in
4 that program, but I think that sounds about right.

5 **Q.** Yeah. And, so, I don't want you to guess. I do
6 have -- we have admitted it. Would you like to see a copy
7 of the actual policy?

8 **A.** Sure, I would.

9 **Q.** I believe it's P-82. And I'll direct you to the top of
10 Page 2. I'll see if I can pull it up on the screen by doing
11 the magic buttons and then get back to where we're at so the
12 Court can see it as well.

13 So the top of Page 2 reads, "The purpose of this report
14 is to list total customer purchases for the current month
15 that exceed pre-determined multiples of the average monthly
16 purchases of the division customers broken down into certain
17 families of drugs." Does that sound --

18 MS. MCCLURE: Your Honor, this document is dated
19 2-1-99 at the top of it. I believe that this is a legacy
20 Bergen Brunswick document. I note that Mr. May [sic] is a
21 legacy Amerisource employee. Amerisource and Bergen did not
22 merge until 2001.

23 So my question is why are we using a legacy Bergen
24 document -- Mr. Zimmerman was a legacy Bergen employee, Mr.
25 Mays is a legacy Amerisource employee -- with an Amerisource

1 witness?

2 THE COURT: Can you answer that, Mr. Farrell?

3 MR. FARRELL: I can. I believe I very carefully
4 and technically laid the foundation that this witness was at
5 Bergen Brunswig and that this policy was taken from the
6 Bergen Brunswig company into the merger and that it fairly
7 and accurately depicts the program that he was the Vice
8 President of.

9 THE COURT: Well, that's right, isn't it,
10 Ms. McClure?

11 MS. MCCLURE: Yes, I understand that, Your Honor.
12 However, Mr. Mays also testified that because -- he
13 testified five minutes ago that because this program was
14 created under Bergen Brunswig, he wasn't intimately familiar
15 with the formulas in the calculation.

16 THE WITNESS: I've never seen this document
17 before. I'm sorry.

18 THE COURT: Well, counsel, where are you going
19 with this? He hasn't seen it before.

20 MR. FARRELL: Well, for him not seeing the
21 document before, he testified almost exactly -- I was really
22 just trying to show him the document to confirm that he
23 wasn't guessing, that this was what they were doing.

24 THE COURT: Well, I'll overrule the objection and
25 let you go ahead.

1 MR. FARRELL: We'll take this document down.

2 BY MR. FARRELL:

3 Q. So getting back to our diagram, in general, from --
4 as of 2006 immediately before the change,
5 AmerisourceBergen was looking at the past month of all
6 similarly situated customers at a distribution center
7 and calculating an average; correct?

8 A. I believe that is correct, yes.

9 Q. And then you were multiplying that average number by
10 three to create an ingredient limit; correct?

11 A. That was what would flag an order to appear on the
12 report.

13 Q. And you were doing this by dosage unit; correct?

14 A. I can't -- I don't know.

15 Q. Okay. So if a customer ordered more than three times
16 the average amount of customers from that distribution
17 center, AmerisourceBergen was shipping and then reporting it
18 to the DEA in an after-the-fact monthly report. Agreed?

19 A. I think there -- it was reported daily if I'm not
20 mistaken. And there were some options for DEA.

21 Q. So let's break that down into pieces.

22 A. Okay.

23 Q. If a customer ordered more than three times the average
24 of other customers, AmerisourceBergen at this point in time
25 was shipping the order and then reporting it to the DEA.

1 Agreed?

2 **A.** Agreed.

3 **Q.** So the ship and report. Now, beginning in 2005, you
4 met with the DEA and had a couple of telephone calls with
5 them. Agreed?

6 **A.** Met with DEA and we had one follow-up call that I know
7 of.

8 **Q.** Okay. And then in April of 2007 you're aware there was
9 an Immediate Suspension Order served on a distribution
10 center? Yes?

11 **A.** Yes, that's correct.

12 **Q.** And you had personal knowledge when that happened?

13 **A.** Yes, that's correct.

14 **Q.** And then by June 22nd of 2007, AmerisourceBergen
15 entered into a settlement agreement with the DEA. And as a
16 component of that settlement agreement, AmerisourceBergen
17 began developing a new Order Monitoring Program. Correct?

18 **A.** An enhanced program, that's correct.

19 **Q.** And that's how we get to the OMP program which was
20 rolled out and executed by AmerisourceBergen on June 30th,
21 2007. Agreed?

22 **A.** Agreed.

23 **Q.** Very good. Now, I want to leap frog forward a little
24 bit and look at 2014. We just spent a considerable amount
25 of time with Mr. May. Did you have the privilege to hear

1 his testimony?

2 **A.** No, sir.

3 **Q.** Are you familiar with what they have been calling the
4 dashboard?

5 **A.** Somewhat, yes.

6 **Q.** Okay. Was the dashboard available at AmerisourceBergen
7 prior to 2014?

8 **A.** Not the dashboard that David would be referring to.

9 **Q.** Okay. Are you aware of anybody at AmerisourceBergen
10 attempting to upload the historical pre-2014 data into the
11 new tool being used by AmerisourceBergen?

12 **A.** I don't know.

13 **Q.** Okay. Between 2007 and 2014 was AmerisourceBergen, in
14 addition to looking at the data it had, was
15 AmerisourceBergen relying upon public data sources?

16 **A.** I'm not sure I follow you.

17 MS. MCCLURE: Objection, date.

18 THE COURT: Yes. Can you put a date on it, Mr.
19 Farrell? You already did. Overruled.

20 MS. MCCLURE: The objection, Your Honor, was to
21 the public data sources. I don't know what that means.

22 THE COURT: Oh, okay. I see. Can you identify
23 the time period that you're, you're questioning him about
24 public data?

25 MR. FARRELL: Yes, Your Honor.

1 THE COURT: Okay. Go ahead.

2 BY MR. FARRELL:

3 Q. So I'll represent to you that Mr. May testified
4 earlier that at AmerisourceBergen now that he tries to
5 read and obtain all information he can from the
6 available public sources. And I wanted to ask -- I'm
7 going to ask you whether or not these sources were
8 available to you or whether or not the Diversion Control
9 Program relied on those sources between 2007 and 2014.
10 Okay?

11 A. Okay.

12 Q. The first is the reports from the Office of the
13 Inspector General, the OIG. Are you aware as to whether or
14 not ABC's Diversion Control Program was relying upon
15 historical reports from the Office of the Inspector General
16 when executing its duties to monitor suspicious orders?

17 MS. MCCLURE: Objection, Your Honor. There's been
18 no foundation laid that there is any relevant OIG report in
19 the time period we're talking about which I believe was just
20 defined as '07 to '14. I note that Mr. Farrell is holding
21 in his hand a 2019 OIG report.

22 So I, I don't understand what -- how you're examining a
23 witness on whether he did or the company did rely on certain
24 kinds of reports or documents that have not been established
25 to exist in the first place.

1 THE COURT: Yeah. Can you clear that up,
2 Mr. Farrell?

3 MR. FARRELL: Yes. I was trying to.

4 THE COURT: I'll sustain the objection and you may
5 fix it if you can.

6 MR. FARRELL: I, I'll be more direct with the, the
7 foundation. Let me see if I can get the document camera up.
8 BY MR. FARRELL:

9 Q. Sir, I'm going to -- this is a document that's been
10 admitted into evidence and I'm going to flip to a page
11 in the back. I'm going to flip to Page 53 and I'm going
12 to put it up on the screen.

13 MS. MCCLURE: Your Honor, I request information
14 about what document this is that we are referencing. I
15 don't -- he's saying it's been admitted. I don't have
16 information about what the document is called, what the date
17 of the document is, the exhibit number. So I object to this
18 page being brought up on the screen without this preliminary
19 information.

20 THE COURT: Identify it for the record, Mr.
21 Farrell.

22 MR. FARRELL: This is DEF-WV-01597 which is the
23 Office of the Inspector General, United States Department of
24 Justice, Review of the Drug Enforcement Administration's
25 Regulatory and Enforcement Efforts to Control Diversion of

1 Opioids. It's dated September, 2019, and it was admitted
2 through the witness David May.

3 MS. MCCLURE: September -- I'm sorry. Can I
4 request information about -- did he say September, 2019, or
5 September 19th?

6 I believe this document is dated September, 2019, and
7 the question to the witness is whether, quote, public data
8 sources like OIG reports were considered by
9 AmerisourceBergen in the 2007 to 2014 time period.

10 So I suggest that the proffer of the document from 2019
11 does not get at my original objection, Your Honor.

12 THE COURT: Okay. I'll sustain the objection and
13 you can clear it up if you can.

14 MS. MCCLURE: And, Your Honor, I would request
15 that the document not be displayed in light of the fact that
16 I think that this page from this document is being displayed
17 on the ELMO.

18 THE COURT: Well, it's not up there now. Yeah, it
19 is up there.

20 MS. MCCLURE: Until and unless a foundation is
21 laid, that is.

22 THE COURT: Right, okay.

23 MR. FARRELL: Judge, may I respond briefly?

24 THE COURT: Yeah. It's on the ELMO here but it's
25 not over here. Yeah. Can you take it down until we have it

1 in a position where you can show it to him?

2 MR. FARRELL: Yes. If I may, I don't need to lay
3 a foundation for the document. It's already been admitted
4 in the record by the defendants, and it is a document that
5 David May, serving in his present capacity as Diversion
6 Control, said he relied upon when performing his functions.

7 What I want to ask him is at the back end of this
8 document are a list of other OIG and other GOA [sic] reports
9 that are identified in an appendix. And I simply want to
10 ask this witness if, like David May currently, he too was
11 reviewing the OIG and GOA [sic] --

12 THE COURT: Okay, you can ask him. I'll overrule
13 the objection. Go ahead.

14 BY MR. FARRELL:

15 Q. So, Mr. Mays, all of the fun has been taken out of
16 it. There are documents -- there are other versions,
17 prior reports from OIG, GOA [sic] that are on Page 53
18 and 54. There's a total of eight of them. So without
19 belaboring the point, at AmerisourceBergen Diversion
20 Control were you looking at or relying upon reports from
21 the OIG or GAO during the time frame prior to 2014 when
22 performing your duties for AmerisourceBergen?

23 A. No.

24 Q. So is it safe to say that during the same time frame
25 between 2007 and 2014 that AmerisourceBergen was not relying

1 upon prescribing rates from the CDC?

2 **A.** Not that I know of.

3 **Q.** How about CDC overdose rates?

4 MS. MCCLURE: Your Honor, to the extent that
5 there's not been a foundation laid as to whether these
6 documents exist or not that could have been relied on in the
7 first place, I object to this line of questioning absent a
8 foundation that such documents were something that would
9 have been reviewed.

10 THE COURT: Overruled. I'm going to let him
11 pursue it.

12 Go ahead, Mr. Farrell.

13 BY MR. FARRELL:

14 **Q.** At ABC Diversion Control between 2007 and 2014 were
15 you studying CDC overdose rates?

16 **A.** I don't recall that we did.

17 MS. MCCLURE: Your Honor, I also object. The
18 question that was just asked was through 2014 and I note
19 that Mr. May [sic] had indicated previously that it was
20 either 2010 or 2012 when he -- I mean Mr. Mays testified
21 that it was 2007 or 2012 when he was no longer running the
22 Diversion Control program and Mr. Hazewski had taken over.
23 2010. I'm sorry.

24 MR. FARRELL: I believe he testified that he was
25 familiar with the policies and procedures up and through

1 until Mr. May arrived at AmerisourceBergen.

2 THE COURT: I think he did and I'll overrule the
3 objection. Go ahead.

4 BY MR. FARRELL:

5 Q. So, again, Mr. Mays, I'm only going to be talking
6 about between 2007 and 2014 for these questions. This
7 time frame, was AmerisourceBergen called OMP?

8 A. Was called OMP?

9 Q. Yes, sir.

10 A. I think until around 2014, something like that. But,
11 again, I wasn't in control of it for the last few years of
12 that period.

13 Q. So I guess what I'm trying to do is I'm trying to find
14 some vernacular for us to be able to reference time frames.
15 And I know that the titles of the documents change.

16 When I reference OMP, I'm going to be referencing the
17 policies and procedures between 2007 up until the enhanced
18 in 2014. Okay?

19 MS. MCCLURE: Your Honor, I'm sorry to have to
20 object, but we've been through the fact that the Diversion
21 Control Program at AmerisourceBergen Mr. Mays testified
22 about has many components.

23 One component of that program, whether it's in 2007,
24 2014, or today, is the OMP, which is the Order Monitoring
25 Program. I think it's confusing to now start to refer to a

1 period of time as the Order Monitoring Program. The Order
2 Monitoring Program is not a period of time.

3 So I object to the extent that this labeling is
4 confusing and contradicts the evidence about how the program
5 worked. The OMP is a method to identify orders and then
6 determine if they're suspicious or not. It is not a period
7 of time.

8 THE COURT: Do you want to respond to that?

9 MR. FARRELL: I'm trying to elicit testimony from
10 a witness with knowledge.

11 THE COURT: Why are you using the OMP to identify
12 the time period?

13 MR. FARRELL: I made a mistake. I was simply
14 trying to find some combination of words that would limit us
15 to a time frame to prevent the continued objections.

16 MS. MCCLURE: May we call it the '07 to '14 time
17 period?

18 THE COURT: I'll sustain the objection. I think
19 this is confusing and --

20 MR. FARRELL: Judge, I'm trying to unconfuse the
21 confusing, so let me start over.

22 THE COURT: All right.

23 BY MR. FARRELL:

24 Q. Mr. Mays, at AmerisourceBergen you've had a
25 Diversion Control Program at all times; correct?

1 **A.** At all times during what period? I'm not sure I
2 understand what you're asking me here.

3 **Q.** During the entire time that you have been employed at
4 AmerisourceBergen, has there been a Diversion Control
5 Program?

6 **A.** Well, I've been employed since 1974. So it wasn't
7 called Diversion Control Program, you know, early on in my
8 career. It was just Suspicious Order Monitoring.

9 And, so, Diversion Control was adopted probably in 2007
10 when we actually called it a Diversion Control Program.

11 **Q.** So what did you call your monitoring and suspicious
12 orders prior to 2007?

13 **A.** It was just -- it was just called Suspicious Order
14 Monitoring. That was our responsibility.

15 **Q.** So we'll call this SOM. Okay?

16 **A.** Okay.

17 **Q.** Is that fair? And then in 2007 did AmerisourceBergen
18 then implement a Diversion Control Program?

19 **A.** Yes. That was part of our settlement with DEA.

20 **Q.** And what was the name of that?

21 **A.** It was Diversion Control Program.

22 **Q.** Perfect. So we'll call this Diversion Control Program.
23 Then in 2014 it was enhanced; correct?

24 **A.** Yes.

25 **Q.** So we'll call that the enhanced Diversion Control

1 Program. Is that fair?

2 **A.** I think so, yes.

3 **Q.** Very good. So between 2007 up to 2014 did the
4 Diversion Control Program rely upon CDC overdose rates?

5 **A.** Not that I recall.

6 **Q.** Did it rely upon populations?

7 **A.** Not for the period that I can recall.

8 **Q.** Did it look at the individual customer's historic
9 ordering records?

10 **A.** Yes, I believe so.

11 **Q.** How far back did it look at the historic ordering
12 records?

13 **A.** In the Order Monitoring Program?

14 **Q.** In the Diversion Control Program between 2007 and 2014
15 you testified that AmerisourceBergen would look at the
16 ordering patterns of a customer; correct?

17 **A.** We -- when we designed the system in 2007, we, we
18 looked back and got data on customer purchases. I think it
19 was a year to build, develop that database for the, for
20 setting the threshold.

21 **Q.** And you testified that you compared one customer to
22 another customer; correct?

23 **A.** Well, we compared customers in peer groups and size.

24 **Q.** So you would look at customers that had the similar
25 size and make comparisons when performing your duties?

1 **A.** We would make comparisons of our customers -- if it's a
2 retail pharmacy and it was a small, medium, or large, it
3 would be compared to other retail pharmacies in that same
4 peer group.

5 **Q.** Very good. Now, did you also look at the overall
6 volume of controlled substances that was sold into the
7 county when performing your functions for the Diversion
8 Control Program between 2007 and 2014?

9 **A.** Well, again, I'm not so sure about the last two years,
10 but I know when we designed the program in 2007, we weren't
11 looking at counties for geography.

12 **Q.** Now, okay. Were you, were you able to identify
13 patterns from a broad range of customers for each
14 distribution center?

15 **A.** Can you repeat that? I'm not really sure what you're
16 looking for.

17 **Q.** When we just talked a second about the 2007 letter, I
18 thought that you had agreed with me that you studied the
19 patterns of a particular customer; correct?

20 **A.** It was the purchases of the customer.

21 **Q.** The pattern of purchases from a particular customer;
22 correct?

23 **A.** I believe so, yes.

24 **Q.** And you testified that you also studied the patterns
25 and purchases from the customer base?

1 **A.** Yes.

2 **Q.** And then you testified that you also compared the
3 patterns of purchases of a customer to your customer base?

4 MS. MCCLURE: Your Honor, objection, asked and
5 answered.

6 THE COURT: It has been asked and answered.
7 You're trying to --

8 MR. FARRELL: Help him, yes, Your Honor.

9 THE COURT: Overruled. Go ahead.

10 BY MR. FARRELL:

11 **Q.** So you also compared the patterns of purchases from
12 your customer to the patterns and purchases to your
13 customer base. Agreed?

14 **A.** In their -- the customers and their peer group.

15 **Q.** Yeah, within their peer group, yes.

16 **A.** Right.

17 **Q.** Now, we heard testimony here this morning that nowadays
18 they're looking at the volume of controlled substances being
19 sold overall in the county. Is it your testimony that prior
20 to 2014 AmerisourceBergen was not using that factor?

21 **A.** Again, I can't speak for the last three or four years
22 of that time period, but in the beginning when we enhanced
23 the program in 2007, we were not looking at counties.

24 **Q.** What about in geographic areas? Were you considering
25 whether or not there were too many pharmacies within a

1 geographic area?

2 MS. MCCLURE: Vague, objection, Your Honor, too
3 many pharmacies.

4 THE COURT: Overruled. Go ahead.

5 THE WITNESS: I'm not sure I follow you. It
6 was -- you know, we basically designed the system to, to
7 compare pharmacies against their peer group without relation
8 to how many pharmacies are in a certain area or what the
9 geographical area was.

10 BY MR. FARRELL:

11 **Q.** What about the overall volume of controlled
12 substances sold to a state? Would you consider that as
13 a factor when performing your functions of Diversion
14 Control?

15 **A.** We considered that in performing different areas of
16 Diversion Control, any information that we knew about
17 patterns of abuse in certain states. There were certain
18 drugs that were abused in certain areas of the country. But
19 we didn't have that factored into the Order Monitoring
20 Program at that time if that makes sense.

21 **Q.** Yes, sir. So what about whether a particular community
22 was a healthcare hub? Did you consider that as a factor
23 when exercising and executing your duties of the Diversion
24 Control Program?

25 **A.** That would be taken into consideration during due

1 diligence investigations of customers and new as far as
2 what's in the area.

3 **Q.** What about from an algorithm standpoint? Did it --
4 would it make a difference or would you adjust thresholds
5 based upon whether or not a community was serving as a
6 healthcare hub?

7 **A.** The thresholds could be adjusted if there was a
8 legitimate reason for the volume.

9 **Q.** My question is, aside from due diligence --

10 **A.** Uh-huh.

11 **Q.** -- was there an automatic policy or procedure to
12 elevate thresholds depending upon whether or not that
13 community was a healthcare hub?

14 **A.** Not that I recall, no.

15 **Q.** What about quotas? Were you relying upon quotas from
16 the DEA when you were executing your duties under the
17 Diversion Control Program?

18 **A.** No.

19 **Q.** Was the Diversion Control Program between 2007 and
20 leading up to 2014, was it a national program?

21 **A.** What do you mean by national? I'm sorry.

22 **Q.** How many distribution centers approximately were there
23 in the United States owned by AmerisourceBergen that were
24 selling controlled substances between 2007 leading up to
25 2014?

1 **A.** Well, that number fluctuated somewhat. But all of
2 those AmerisourceBergen Drug Company DCs were on the
3 program.

4 **Q.** And were they all running the same Diversion Control
5 Program?

6 **A.** Well, we only had one Diversion Control Program, the
7 corporate program.

8 **Q.** And was it being executed at each of the distribution
9 centers?

10 **A.** The policies were being followed, that's correct.

11 **Q.** At the Diversion Control Program were you watching or
12 monitoring administrative actions taken by the DEA against
13 other wholesale distributors?

14 **A.** Yes. We would monitor anything that was going on in
15 the industry and we monitored any news on customers. So our
16 investigators would have like Google alerts and they would
17 put certain keywords in there where we could find out if,
18 you know, a customer had action taken against them for some
19 reason or if something happened with the regulatory
20 agencies. We were kept abreast of all that.

21 **Q.** And do you recall ever seeing an alert when the DEA
22 took administrative action against Cardinal Health sometime
23 in 2012?

24 **A.** I don't know if we got a Google alert, but we heard
25 about it, you know, either in the news or some other way.

1 Q. Were you personally aware of the administrative action
2 taken by the DEA against Cardinal Health?

3 A. Generally I was aware, yes.

4 Q. Are you familiar with the administrative action and the
5 temporary restraining order that was filed by Cardinal
6 Health in that case?

7 A. Not very much, no.

8 Q. How about this?

9 A. What was it about?

10 Q. Were you aware of an amicus brief being filed in that
11 case on behalf of your trade organization?

12 MS. MCCLURE: Your Honor, I object to the extent
13 that we're now going into Noerr-Pennington covered issues
14 with amicus brief filings. This harkens back to last week.

15 THE COURT: Is this a Noerr-Pennington problem?

16 MR. FARRELL: It is not, Your Honor, in my humble
17 opinion for what it's worth. This is no different if the
18 HDMA group goes and meets with the DEA versus if the HDMA
19 files a legal pleading in an HDMA only proceeding.

20 THE COURT: Okay, overruled. You can go ahead.

21 BY MR. FARRELL:

22 Q. Were you aware of an amicus brief being filed?

23 A. Yeah, I seem to remember that.

24 Q. In fact, did you review the amicus brief before it was
25 filed?

1 **A.** I think I remember reading it, but I can't say
2 100 percent that I remember it.

3 **Q.** Are you aware of the holding by the District Court of
4 Columbia following that proceeding?

5 **A.** No, I don't remember that.

6 **Q.** So do you know the outcome of that proceeding?

7 **A.** No, I don't remember exactly what the outcome was.

8 **Q.** Do you know whether or not there was a published
9 opinion in the case?

10 **A.** Published opinion by who?

11 **Q.** By the Federal District Court of Columbia in
12 Washington, D.C.

13 **A.** I'm not familiar with it, no.

14 **Q.** Okay. I'm going to do my best to make sense of this.
15 But your Diversion Control Program had a work flow or a
16 decision tree on how it was supposed to operate. Agreed?

17 MS. MCCLURE: Your Honor, objection to the
18 commentary for the record, "I'll do my best to make sense of
19 this." I don't know what that's referring to, but I would
20 just request that Mr. Farrell keep his commentary to a
21 minimum.

22 MR. FARRELL: I did not mean anything pejorative.

23 THE COURT: Well, if he -- you can answer if you
24 know, Mr. Mays.

25 THE WITNESS: I'm not sure he got to the question.

1 MR. FARRELL: I'm not sure I did either.

2 THE COURT: Ask the question again, Mr. Farrell.

3 BY MR. FARRELL:

4 Q. I'm going to make a diagram and I'm going to ask
5 you questions about whether or not it's an accurate
6 reflection of your Diversion Control Program between
7 2007 through 2014.

8 MS. MCCLURE: I'll just continue to object to the
9 extent that Mr. Mays has previously testified several times
10 now that starting in 2010 he no longer had responsibility
11 for the Diversion Control Program.

12 MR. FARRELL: And I'll repeat that this witness --
13 I very carefully laid the foundation that he was aware.

14 THE COURT: Yeah, overruled. Go ahead, Mr.
15 Farrell.

16 BY MR. FARRELL:

17 Q. So we start up here with -- I'm going to use a
18 different color. We start up here with a customer, a
19 pharmacy. Rx places an order with AmerisourceBergen.
20 That's the first step that happens in this transaction.
21 Agreed?

22 A. Agreed.

23 Q. Now, the program that was adopted in 2007 starts with a
24 computer that reviews the order. Agreed?

25 A. Agreed.

1 Q. And that computer makes a determination as to whether
2 or not that order is above or below a threshold. Is that
3 right?

4 A. We're talking about 2007; correct?

5 Q. Yes, sir.

6 A. Yes.

7 Q. I'm going to put the word "threshold" here and we're
8 going to come back to it in a minute.

9 So once the order goes through the computer, if it's
10 below the threshold, then the next step is that
11 AmerisourceBergen ships the order. Agreed?

12 A. No.

13 Q. Sorry. What I did miss?

14 A. No. You said -- oh, if it's below the threshold? Yes,
15 they would release and ship. Yes. I'm sorry.

16 Q. Then what happens is that you report the transaction to
17 ARCOS, the national database; is that right?

18 A. That's not entirely correct. It depends on what the
19 drug is. So only if it's a Schedule II or III narcotic and
20 we report those monthly to ARCOS. So that's not a daily
21 occurrence.

22 Q. Okay. There was testimony earlier that all controlled
23 substances were reported within two days. Was that the
24 practice at AmerisourceBergen between 2007 through 2014?

25 A. Well, all controlled substances were reported to DEA,

1 but that's not -- ARCOS is different.

2 Q. I see. So with ARCOS what gets reported by
3 AmerisourceBergen during the 2007 through 2014 time frame?

4 A. So it's the -- it's part of the settlement. We agreed
5 to report all controlled substance sales --

6 Q. But ARCOS --

7 A. -- every 48 hours.

8 Q. ARCOS is Schedule II narcotics; correct?

9 A. And Schedule III narcotics.

10 Q. And Schedule III. And at this point in time, the
11 report was done to Ameri- -- from AmerisourceBergen to the
12 DEA on a monthly basis?

13 A. For ARCOS.

14 Q. Yes.

15 A. Correct.

16 Q. Now, if, in fact, the order goes to a computer and is
17 above the threshold, something else happens. Agreed?

18 A. Agreed.

19 Q. If it's above the threshold, the order is held; is that
20 right?

21 A. That's correct.

22 Q. And the order is held until due diligence dispels
23 suspicion?

24 A. It's, it's held at the distribution center level.

25 Q. Right. It does not get shipped, does it?

1 **A.** It doesn't get shipped until and unless they have --
2 unless they agree that they have no suspicions and it's okay
3 to ship. And they can release the order at the distribution
4 center level.

5 **Q.** And we call that due diligence?

6 **A.** Based on their knowledge of the customer.

7 **Q.** And we call that due diligence?

8 **A.** We call it due diligence when we conduct an
9 investigation or when it's a new customer, yes.

10 **Q.** Right.

11 **A.** Yes.

12 **Q.** Now, once due diligence is performed, there's two
13 things that can happen. One is that you dispel suspicion
14 and then you go ahead and ship. Correct?

15 **A.** That's at the DC level. I just disagree with the
16 terminology. It's not what we call due diligence.

17 **Q.** Okay. So help me understand. There's, there's two
18 different components. There's one at the distribution
19 center level and one at corporate level; correct?

20 **A.** That's correct.

21 **Q.** All right. So when we hold it, the due -- what happens
22 if the distribution center releases it?

23 **A.** They, they can release it if, if, if they -- based on
24 their knowledge of the customer. If they're comfortable
25 releasing the orders, they can release it. And if they're

1 not sure about it, then they can send those to corporate for
2 review.

3 **Q.** And where does that -- does that get recorded? Does it
4 get documented?

5 **A.** Did you say reported or recorded?

6 **Q.** Recorded.

7 **A.** Yeah, the system tracks that.

8 **Q.** All right. So we're going to clean this up. All
9 right. So at the distribution level -- I'm having a devil
10 of a time here. At the distribution level they can release
11 the, the order or they can send it up to you in corporate
12 level. Correct?

13 **A.** That's correct.

14 **Q.** And, so, the key here is this; is that nothing happens
15 to that order until it's either cleared by the distribution
16 center or cleared by corporate?

17 **A.** That's correct.

18 **Q.** Before it gets cleared by either the distribution
19 center or by corporate at AmerisourceBergen, you're not only
20 holding this order, you're holding all other orders of the
21 similar drug class until a decision is made. Agreed?

22 **A.** That's correct.

23 **Q.** And if the decision is made that there's no suspicion,
24 the order can be shipped. Agreed?

25 **A.** That's correct.

1 **Q.** But if suspicion cannot be eliminated, you have a
2 responsibility to block the order and tell the DEA. Agreed?

3 **A.** We report it to the DEA and it's cancelled or rejected.

4 **Q.** Right. So now let's talk about this, this key point
5 right here for a second. Let's talk about the computer
6 algorithm. You'll agree with me that this entire process
7 does not get triggered unless your computer flags it.
8 Agreed?

9 **A.** That's correct.

10 **Q.** So the computer -- when the computer is flagging it,
11 the computer has an input that you call a threshold; right?
12 Is that correct?

13 **A.** I'm not sure it's an input, but the thresholds are
14 loaded in there.

15 **Q.** So somebody loads into a computer a threshold. And
16 that's the -- explain for the Court in your words what is a
17 threshold?

18 **A.** So a threshold is based on what we discussed earlier
19 where we take the history of the customers, separate the
20 customers by DEA business activity, whether it's retail
21 pharmacy, hospital, et cetera.

22 Then we determine the size of the customer. And I'm
23 talking in 2007 terms when we designed the enhanced system.
24 And then, then split the customers into different groups by
25 size.

1 So you've got small retail, medium retail, large
2 retail, same way for hospitals and other, other business
3 activities.

4 And then that threshold gets determined based on their
5 average purchases for a month, and then the factor of three
6 is added to that. And that's where you get the threshold
7 for each size for each customer for each -- and that's per
8 drug family. There's probably 60 something drug families.

9 **Q.** So are we talking about -- I'm sorry. Did you say the
10 prior month?

11 **A.** Yeah. In the beginning it was -- I think it was --
12 well, the threshold wasn't determined by the prior month.
13 The thresholds were more or less static based on all that
14 history that was loaded in there.

15 **Q.** The default threshold.

16 **A.** But the customer's purchases would be what would
17 trigger that threshold if they exceeded.

18 **Q.** I understand. I guess my ultimate question at this
19 late hour is who determined what that threshold was
20 initially?

21 **A.** Well, AmerisourceBergen did.

22 **Q.** And how did you determine it?

23 **A.** I just explained it to you.

24 **Q.** So you took that customer's prior 30 days --

25 **A.** So it's, it's based on three times their monthly

1 average.

2 **Q.** And how many months do you use for the average?

3 **A.** Well, I guess it would vary from month to month.

4 **Q.** So let's use a fictional pharmacy --

5 **A.** Uh-huh.

6 **Q.** -- of Bob's pharmacy. If Bob comes to you and says, "I
7 want to be an ABC customer in 2007, I have a pharmacy in
8 Huntington, Cabell County, West Virginia," what would
9 AmerisourceBergen do to calculate the threshold that I could
10 order every month of hydrocodone and oxycodone?

11 **A.** Well, if they were a new customer, they would be set at
12 the minimum threshold for that size because we don't have
13 their history.

14 **Q.** And what would be those minimum thresholds?

15 **A.** Well, it's going to vary per customer size and business
16 activity.

17 **MR. FARRELL:** We'll do that as the very last
18 portion of today, Your Honor.

19 **BY MR. FARRELL:**

20 **Q.** So this is a document that was shown earlier.

21 **MS. MCCLURE:** Your Honor, I would request that
22 this document not be displayed to the overflow room.

23 **THE COURT:** Okay.

24 **MR. FARRELL:** My apologies.

25 **BY MR. FARRELL:**

1 **Q.** This is a document that was shown earlier that is
2 for -- happens to be a pharmacy in Cabell County. And
3 over here you see where it says "historical threshold"
4 on the right-hand side?

5 **A.** I'm not familiar with -- I'm not familiar with this
6 document.

7 **Q.** Okay. That's fair. Let me see if I can do it. What
8 is the historical minimal thresholds for a pharmacy in
9 Huntington, Cabell County, West Virginia? Do you recall
10 what the base line default threshold was?

11 **A.** It wasn't based on county.

12 **Q.** Okay. It was based on customer type?

13 **A.** Customer type and size.

14 **Q.** And, so, what would be -- how would you determine
15 customer size?

16 **A.** It would be you take all the -- once you divided the
17 customers into segments and retail pharmacies and then we --
18 the size is determined -- was determined in the beginning
19 based on their dollar purchase volume from ABC.

20 **Q.** And it wasn't just controlled. It was all purchases of
21 pharmaceuticals; correct?

22 **A.** I believe it was all purchases of all prescription
23 drugs, yes, controlled and non-controlled.

24 **Q.** I think I have the actual document. Can you pull up --
25 it's been admitted already -- P-432?

1 Sir, I'll represent to you that this is a 2009 RVP
2 talking point that has been entered into the record. Do you
3 recognize this document or this format of this document?

4 **A.** No, sir, I do not.

5 **Q.** So if we can blow it up, just the middle box, if
6 there's testimony in this case that the current defaults for
7 oxycodone and hydrocodone in 2009 were for small, medium,
8 and large pharmacies, is that consistent with your
9 understanding of how the program worked?

10 **A.** I don't know in what context that's stated. I don't
11 know why those thresholds are listed in that document.

12 MS. MCCLURE: Your Honor, objection to the extent
13 this witness has said he's not seen this document before.

14 THE COURT: Sustained.

15 BY MR. FARRELL:

16 **Q.** Do you know what the thresholds for oxycodone were
17 for small retail pharmacies in AmerisourceBergen in
18 2009?

19 **A.** No, I don't. I don't remember what they were.

20 **Q.** Where would I find where your Diversion Control Program
21 was setting the default thresholds between 2007 and 2014?

22 **A.** Well, I believe they were recalculated every year if
23 I'll not mistaken, so they weren't just the same all the
24 time.

25 **Q.** Who recalculated them?

1 **A.** I think we -- I think our IT group would help us with
2 that and they run reports. But I don't know exactly who was
3 responsible for reformulating that.

4 **Q.** Where can I find in the record how your Diversion
5 Control Program was setting default thresholds?

6 MS. MCCLURE: Your Honor, I object to asking this
7 witness what seems to amount to a discovery inquiry at a
8 trial in this case.

9 Mr. Mays is a witness. He is not going to be able to
10 point Mr. Farrell to where he can find in the record. Mr.
11 Farrell is an attorney. He can either make a request in the
12 discovery period or he can find the documents in the record
13 himself.

14 THE COURT: Yeah. I sustain the objection and
15 mercifully it's 5:00, Mr. Farrell, so we'll go at it again
16 in the morning.

17 MR. FARRELL: Yes, sir.

18 THE COURT: And, Mr. Mays, I'm going to excuse you
19 until 9:00 in the morning. We're going to ask you to come
20 back and we'll proceed from this point on. Thank you, sir.

21 THE WITNESS: Thank you, Your Honor.

22 THE COURT: I'll see everybody at 9:00 in the
23 morning.

24 MR. FARRELL: Judge, before we leave, I do want to
25 begin the triggering process. We do intend to submit had

1 testimony of Mr. Gray and Mr. Kelley for the Court. I
2 believe there's a mechanism where we say it on the record
3 and then there's a 24-hour period before you get to see the
4 end result.

5 MR. HESTER: And, Your Honor, we, we filed a
6 motion on that to exclude that, those, that testimony and
7 more broadly to exclude the evidence relating to the had
8 petition activities.

9 THE COURT: All right. I'll see everybody at
10 9:00.

11 (Trial recessed at 5:02 p.m.)
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1 CERTIFICATION:

2 I, Ayme A. Cochran, Official Court
3 Reporter, and I, Lisa A. Cook, Official Court Reporter,
4 certify that the foregoing is a correct transcript from
5 the record of proceedings in the matter of The City of
6 Huntington, et al., Plaintiffs vs. AmerisourceBergen
7 Drug Corporation, et al., Defendants, Civil Action No.
8 3:17-cv-01362 and Civil Action No. 3:17-cv-01665, as
9 reported on May 17, 2021.

10
11 S\Ayme A. Cochran

12 Reporter

13 s\Lisa A. Cook

14 Reporter

15 —

16 May 17, 202117 Date
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